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## THE LIABILITY OF THE ASSOCIATES IN A DEFECTIVE CORPORATION.

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To say that it is the present day tendency to conduct business and commercial enterprises through the medium of corporations in order to secure the resulting limitations of liability to those engaged therein, is to state an obvious fact. Partnerships are fast falling into disuse; individuals are organizing "one man corporations," that is to say, corporations in which all the stock is owned or controlled by one individual; and in direct proportion to the hazard of the proposed enterprise, intending incorporators are seeking the advantage of those states in which the requirements for publicity and official supervision are lax and in which subscription for any considerable proportion of the shares of the capital stock prior to organization, is not a necessity, to the end that they may risk but little in their quest for gain. It goes without saying that the vast majority of the companies organized in the United States are incorporated in good faith, but it is unfortunate that it is possible to evade the laws of the state of the residence of the incorporators, when its policy towards corporations as declared by its legislative enactments, imposes too many irksome restrictions and guarantees to the public a protection which the incorporators would seek to avoid. And so, too, it is unfortunate that frequently those who have extended credit to a corporation, relying on the published statement of its authorized capital stock, find when it is too late that but a modicum of the authorized shares have been subscribed for and issued, and that the assets of the corporation are practically nil.

But the very facility with which corporations may be organized in many of our states and territories frequently breeds a certain carelessness on the part of those who would shelter themselves behind the outward form and show of a corporation. Though the require-

ments are but few, often some of the most essential are not complied with, and the important questions arise: Can such defects render the incorporation invalid and impose upon those associated by virtue thereof the liability of co-partners? And if so, what are those defects?

Partnerships and stock corporations are both associations of individuals, united in a common business venture, under an agreement to divide among themselves the profits thereof. In a partnership each associate assumes the liability of the entire partnership indebtedness. In a corporation the liability of the associates is limited.

At common law every association engaged in a commercial venture under an agreement among the associates to divide profits was a partnership and each associate had imposed upon him the liability of a partner.<sup>1</sup> A grant of authority from the sovereign was necessary to enable the associates to limit their liability. This grant was termed a charter. It was a franchise to associate as a corporation, to limit the liability of each associate to the amount by him subscribed as capital, for the prosecution of the joint venture, and to relieve him from all liability when his subscription was fully paid.

In the United States, the right to incorporate was rarely conferred by executive grant; it was most commonly granted by the legislature by special act. By reason of abuses which crept into this practice and hindrance of general and public legislation, incorporation by special act has very generally fallen into disuse or is forbidden by constitution. General incorporation acts obtain in most states and a substantial compliance with their provisions is the only method of obtaining the right to associate as a corporation and to limit the personal liability of the associates. These acts are in effect general charters to all who qualify according to their provisions.

Such acts usually provide that a specified number of persons desiring to incorporate, shall file with the clerk of the county where the principal place of business is proposed to be situated, a written instrument, usually called the Articles of Incorporation, by them subscribed and acknowledged, stating the name of the proposed corporation, its place of business, the purposes of the incorporation, the amount of the capital stock and the number of shares into which it shall be divided. A certified copy of these articles is usually required to be filed with the secretary of state, who thereupon is usually required to issue under the great seal a certificate of incorporation.

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1. Story on Partnership, Sec. 2; *Berthold v. Goldsmith*, 24 How. (U. S. 536; *Hunt v. Oliver*, 118 U. S. 221; *Karrick v. Hannaman*, 168 U. S. 328, 334.

The articles of incorporation, when prepared, executed and filed in conformity with the enabling act, constitute the special charter from the state to the associates. In other words, the articles particularize and limit the powers authorized by the general charter or general incorporation act, to the needs and purposes of the incorporators; thereby there is conferred upon them *the mere right to organize a corporation* and to limit the liability of each to the amount proposed to be contributed by him to the joint venture. A corporation *in posse* exists, which, after organization, will become a corporation *in esse*.<sup>2</sup> It follows that no association of individuals organized to engage in a business enterprise by any act or declaration not in pursuance of the enabling statute can divest itself of the character of a partnership and clothe itself with that of a corporation.<sup>3</sup>

It frequently happens, however, that such an association in good faith attempts to comply with an enabling statute, but the proceedings taken by it are defective and the questions then arise, whether the corporate character has been attained and what is the measure of the liability of the associates to the creditors of the association.

The authorities on these questions are numerous and somewhat inharmonious. The most recent and conservative authorities recognize the hardship of holding the associates liable as partners when they have in good faith attempted to limit their liability and lay down the rule that where the defect is formal rather than essential, the incorporation cannot be questioned collaterally and the associates are liable only as shareholders. If the proceedings have been such that a *de facto*, but not a *de jure* corporation has been organized, the associates will be considered as shareholders and the incorporation can be questioned only by the state in *quo warranto* proceedings.<sup>4</sup>

However, the statement of this rule is easier than its application. The question at once arises, what is formal and what is essential. So far as I have been able to discover, the authorities have laid down

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2. *Miller v. Ewer*, 27 Me. 509; *Wechselberg v. Flour City Nat. Bank*, 64 Fed. 90, 95.

3. *Helliwell on Stock and Stockholders*, Sec. 438; *Mokelumne Hill Mining Co. v. Woodbury*, 14 Cal. 424; *Finnegan v. Noerenberg*, 52 Minn. 239; *Kaiser v. Lawrence Savings Bank*, 56 Ia. 104; *Guckert v. Hache*, 159 Pa. 303; *Abbott v. Omaha Smelting Co.*, 4 Neb. 416; *Jones v. Aspen Hardware Co.*, 21 Col. 263; *Bigelow v. Gregory*, 73 Ill. 197.

4. *Cook on Corporations*, Sec. 234; *Helliwell on Stock and Stockholders*, Sec. 438; *Mokelumne Hill Mining Co. v. Woodbury*, 14 Cal. 424; *Finnegan v. Noerenberg*, 52 Minn. 239; *Kaiser v. Lawrence Savings Bank*, 56 Ia. 104; *Guckert v. Hache*, 159 Pa. 303; *Abbott v. Omaha Smelting Co.*, 4 Neb. 416; *Jones v. Aspen Hardware Co.*, 21 Col. 263; *Bigelow v. Gregory*, 73 Ill. 197.

no general rule by which this question may be solved, each case seeming to have been decided on its own merits.

To arrive at such a rule we must consider the reason underlying the enabling laws. As we have already seen, these laws usually provide that the articles of incorporation shall be made a public record. It is self-evident that the reason for this provision is publicity. It is designed to give notice to those intending to deal with the company that it is a corporation, the liability of the members of which is limited, and not a partnership. The required contents of the notice usually are only matters of which the public should be advised for its protection in dealing with the company.

I think that a rule which will come within the reason of the law, is that all acts which the legislature has provided, shall be done for the purpose of protecting the public in its dealings with the future corporation, must be substantially done before a corporation can be organized, either *de jure* or *de facto*. Any other rule would tend to encourage secrecy and fraud. Certainly, associates secretly adopting articles of incorporation and failing to give them the required publicity, as they might adopt articles of co-partnership, cannot be said to have advised the public of their intention to limit their individual liability, and until such notice is given, the law very justly provides that the public may hold them liable as partners; that no corporation, either *de jure* or *de facto*, has been created.<sup>5</sup>

A *de facto* corporation may be defined as an association of individuals who may have made a *bona fide* and colorable attempt to secure a charter and organize a corporation under an enabling act, and who actually assume the use of corporate powers. That is to say, there must be on the face of the record the appearance of having substantially complied with the essentials of the act. If such be the fact, the state alone can question the corporate existence; if such be not the fact, at least so far as limitation of liability is concerned, no corporation has been formed.<sup>6</sup>

The wisdom of the law is in the legislature, not the courts, and the courts cannot say that it is non-essential which the law either in letter or in spirit makes essential.<sup>7</sup>

If the associates file their articles of incorporation in a foreign state and substantially comply with the requirements of its enabling

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5. *Bigelow v. Gregory*, 73 Ill. 197; *Finnegan v. Noerenberg*, 52 Minn. 239; *Abbott v. Omaha Smelting Co.*, 4 Neb. 416.

6. *Finnegan v. Noerenberg*, 52 Minn. 239; *Montgomery v. Forbes*, 148 Mass. 249; *Martin v. Deets*, 102 Cal. 55; *Johnson v. Corser*, 34 Minn. 355; *Walton v. Oliver*, 49 Kan. 107.

7. *People v. Montecito Water Co.*, 97 Cal. 276.

act, as we have already seen they receive in effect a charter from that state; and that state for that enabling act, within the limitation prescribed by the articles, confers upon them the right and authority to organize a corporation. This organization must be effected pursuant to such authority before the incorporation is complete. Where then must the corporation be organized? Obviously the enabling act can have no extra-territorial operation; the authority is derived only from that act and cannot be conferred without the state. Accordingly it follows that the corporation must be organized within the boundaries of the state which authorizes its organization.<sup>8</sup> In order to hold an organization within the state of the residence of the associates valid, it must be also held that the enabling or incorporation acts of every state, territory and foreign country are operative in every other state and that any foreign jurisdiction by legislative enactment or executive decree can enable citizens of another state to associate as a corporation in that state and make the public record of their incorporation in a distant and foreign state. To so hold is to defeat the very policy of all incorporation laws, which, as we have seen, is to give publicity to the fact of incorporation. There is no rule of comity which permits a foreign sovereign to legislate within the confines of the domestic state. To permit foreign laws so to operate is to surrender sovereignty itself. "There is no rule of comity which requires one state to be made the birthplace of corporations chartered by another."<sup>9</sup>

The associates can organize a corporation in the state of their residence only under the enabling act of that state. If they attempt to organize within that state under a grant of authority from a foreign state, the company which they organize is not a corporation. The authority by virtue of which they attempt to organize has no force, effect or existence in the state of their residences, and so far as they are concerned, while acting in that state, the enabling act is as though it had no existence whatsoever. The company which they have organized is not even a *de facto* corporation, for, as has already been seen, such a corporation is premised upon the existence of an enabling act and an attempt to comply therewith, but they have complied with an act which has no existence in the place of the company's organization.

Thomas H. Breeze.

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8. *Miller v. Ewer*, 27 Me. 509; *Smith v. Silver Valley Smelting Co.*, 64 Md. 85; *Bank of Augusta v. Earle*, 13 Pet. 519; *Tioga R. R. v. Blossberg, etc. R. R.*, 20 Wall. 137; *Insurance Co. v. Francis*, 11 Wall. 210; *Ohio, etc., R. R. Co. v. Wheeler*, 1 Black 286; *Paul v. Virginia*, 8 Wall. 169. *Contra, Heath v. Silverthorn Lead Mining and Smelting Co.*, 39 Wis. 146.

9. *Smith v. Silver Valley Smelting Co.*, 64 Md. 85.

## THE INITIATIVE OF THE PRESIDENT.\*

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It is sunset at Jolo and Zamboanga, and dawn on New England's rugged coast. The last glance of the god of day is reflected from the bayonet of the lonely sentinel who walks his beat on the uttermost island of that distant archipelago. The "rosy blush of incense breathing morn" glorifies these historical waters, and the rushing floods of his oncoming light bathe the marble of that shaft in Washington which commemorates a nation's love for the father of his country.

Throughout his diurnal progress, if progressive at all, that self-same orb has rejoiced that not for a moment has he been able to lose sight of the stars and stripes. In all his journey, there was nothing fairer or more enchanting than that city founded by the argonauts of '49, whose glories have been painted by the fascinating narrative of Stevenson, the witching fancy of Bret Harte. Brilliant, joyous, daring San Francisco, combining the enchantment of that city by the Seine, typical of all that is charming in the genius and love of beauty of the French people, with the Oriental mysteries of Bagdad, in the palmy days of Haroun-al-Raschid. There one evening little more than a month ago as the sun sunk behind the Farallones, it stood instinct with life, energy, hope and such happiness as is accorded to man. With the succeeding dawn its crumbling buildings were death traps. Of its people many were dead, thousands in agony and despair, and, more terrible than all, was the glare and roar of the on-coming conflagration. A quarter of a million of men, women, children shiver on the hills hard by. The railroads have sunken into the earth, the earthquake has riven the water pipes which bring the life-giving supply. There too, were demons in human form. Such creatures, in the presence of helpless and suffering innocence, relapse to the cruelty, the merciless outrage of the savage. Has hope taken flight of earth? Ah, no, there is yet hope. Across the continent there is one whose prompt soul is instinct with love and pity for his fellowmen. He is in the White House. The dreadful story comes. He takes counsel of his courage. Back flashes to a man after his own heart, the gallant Funston: "Take

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\*Fifth Lecture on the Storrs Foundation, May, 1906.—[Ed.]

instant charge, declare martial law, suppress disorder, protect the people, use every arm of the service ashore and every ship upon the waters." Swift appeal is made to Congress. Nothing loath, that noble body throws open the treasury and disburses millions to our suffering countrymen. And before the fires are extinguished and the subterranean forces of nature cease to mutter, order reigns in San Francisco, and the heart of a noble people inspired by the example of their president for their suffering brethren, pour out their treasures like water. And yet, in vain would a certain school of constructionists look for any word or syllable of the constitution which justifies this or any similar action on the part of the president. Nor does this pass without attention. When the resolution is offered to appropriate two millions for the sufferers, Mr. Williams, the leader of the minority, addressed the chair, as follows: "Mr. Speaker, if the gentleman will yield to me for a moment, I wish to say that this legislation is of such exceptional and emergency character, that it ought to over-ride all preformed conclusions. For that reason I shall not object to unanimous consent for its consideration." Our countrymen will ever accord their respect to that sturdy minority which in the presence of an exigency so great has laid aside "preformed conclusions" and remembered only that they are Americans. But there is another view of it.

It is true that we have a written constitution, but the fundamental law is not all in the written page. Notwithstanding the "preformed conclusions" of the distinguished leader of the minority and of men of every party who may think with him, it is with deference submitted that indisputable precedents, and the evolution of the American system authorizes the initiative of the president as the direct representative of the people in this case and in all equivalent cases, whether they affect the safety of that people, the peace of the United States, or the strength and honor of the nation itself. It is further submitted that this is now as clearly within the constitution as if the power had been literally and expressly granted by the original instrument itself. As ours is always described as written, so the English Constitution is termed unwritten. This, however, cannot be regarded as strictly true. There are certain famous parchments in writing, which are, so far as they go, as distinctly a written constitution as our own, which Mr. Gladstone in his famous eulogium declared was "struck off in a given period by the brain and purpose of man."

There is *Magna Charta*. While nominally a concession from the crown, the Great Charter was the result of a treaty between the



nation on the one hand, and the king on the other. The king and the people were at issue. The opposing and hostile forces were encamped on either bank of the Thames opposite the island of Runneymede, as were the armies of Napoleon and Alexander of Russia, when those monarchs met on a raft midway the river Niemen and signed the treaty of Tilsit. The Great Charter is therefore a treaty in writing between the king on the one side and the church, the barons and the commons for the first time thoroughly at one on the other. Here we find written certain principles, most sacred, of government, now also immovably anchored in our constitution.

The agreement between the king and Parliament upon the Petition of Right was not without resemblance to the compact of *Magna Charta*.

You will recall the state to which the English people had been reduced by the profligacy and selfishness of Buckingham, and the blinded favoritism of his royal master, Charles the First. The king had demanded of the Parliament, for his army and navy, what were great sums in that day. This was demanded under the pretence of public danger. But the demand was accompanied with one of those threats which have always aroused the spirit of resistance among men of our race. "Every man," said the king in his speech, "must do according to his conscience; wherefore if you (which God forbid) should not do your duties in contributing what the state at this time needs, I must, in discharge of my conscience, use those other means, which God hath put into my hands to save that which the follies of some particular men may otherwise hazard to lose." With the imprisonment of Digges and Elliott, and of the five knights, with the removal of the judges, and the arrest of many of their own members fresh in mind, it was not difficult for Parliament to understand the royal meaning. In that famous body there was neither variableness nor shadow of turning. Wentworth demanded that there should be no more forced loans, no more political imprisonment, no more compulsory employments abroad, no billeting of soldiers without the consent of the household. The supplies demanded by Charles were withheld. The royal word of the monarch was offered as pledge that every freeman should have a fundamental property in his goods, and a fundamental liberty of his person, but the house declined to accept the pledge of his majesty's honor. Coke declared: "Let us put up a petition of right, not that I distrust the king, but I cannot take his trust save in a parliamentary way." The famous document was prepared, and the king with the utmost reluctance gave his assent.

A half century had elapsed. The first Charles who had assented to the Petition of Right, because of his utter disregard of its provisions had met his fate at the hands of his stern and relentless countrymen. The great protector was now no more. The second Charles, dissolute son of a tyrant father, had taken his place among the shadows of royalty. An exile from the wrath of a betrayed and outraged people was his uncle and successor, the second James, a man in whom the merciless cruelty of the monarch was equalled by the narrowness and intolerance of the bigot. William of Orange had landed at Torbay, and had marched on London. Parliament was summoned in a manner which had perhaps been justified by precedent and was subsequently ratified. It then became the duty of that body to define the conditions upon which the act of succession should be passed and the crown settled upon the prince of Orange and his consort. A young lawyer, John Somers, was selected to draw the famous Declaration of Right. This sterling patriot had been one of the counsel for the seven bishops of the Anglican church when, for conscience sake, they had been recently arraigned before the servile judges of James. He had risen last. He spoke scarcely more than five minutes, and sat down with a reputation as a constitutional lawyer and orator which has never grown dim. After the recitation in this declaration of the grievances which the English people had sustained, he enumerated their rights and privileges. Of the rights thus stated, one or two relate to possibilities of strife between the devotees of particular faiths, with which the American people have not as yet been concerned. All the others may in effective substance be found in our constitution as first adopted, or in the amendments which were proposed by the first Congress and subsequently adopted by the people.

At the palace of Whitehall on the 13th of February, 1689, the great convention composed of the estates of the realm and the commons of England met the prince and princess of Orange. In a loud voice the declaration was read by the clerk of the House of Lords. Halifax, speaking in the name of the estates, requested the royal couple to accept the crown upon the terms stated. Whereupon William, speaking for himself and his wife, declared: "We thankfully accept what you have offered us," and gave assurance of their common resolve to uphold the laws and government, with the advice of Parliament.

In the evolution of free government there was but a span between the Declaration of Right and the American Constitution. Not quite fourteen years after this memorable scene at Whitehall in a house

opposite the old South Church on Milk street in Boston, there was born a child, the fifteenth out of a brood of seventeen. It is probably true that the annals of the human race afford no account of another who came to excel him in love of freedom, practical wisdom, knowledge of his fellowmen, power of diplomacy, and persuasive influence upon the times in which he lived and upon subsequent times. Eighty-one years thereafter the name was appended to the Constitution of the United States. It is the name, Benjamin Franklin.

It is possible that others among the leading members of the constitutional convention were contemporaries of the younger members of the Parliament which exacted the Declaration of Right. Certain it is that most of them were familiar with every struggle for liberty made by the intrepid race from which we spring. Certain it is that they knew the history of

That land of old and great renown  
Where Freedom broadens slowly down  
From precedent to precedent.

Certain it is that every colony started out by adopting the whole body of English statutory or customary law. The framers of the constitution also knew what Freeman has declared in his "Growth of the English Constitution," that the English people "have a whole system of political morality, a whole code of precepts, for the guidance of public men, which will not be found in any page of either the statutes, or the common law, but which are in practice hardly less sacred than any principle embodied in the Great Charter, or in the Petition of Right. In short," declared this instructive writer, "by the side of our written law there has grown up an unwritten or conventional constitution." The framers knew that *Magna Charta* was no novel doctrine; that it was but a reiteration of the laws of Edward the Confessor, to which Stephen Langdon, the noble primate of England, had sought to swear the tyrant, of whom it had been said: "Foul as it is, hell itself is defiled by the presence of John;" they knew that the principles of the Great Charter were so familiar that it was discussed, agreed upon and signed in a single day; they knew that to the tribal bond of the Anglo-Saxon we may trace the right of trial by jurors of the vicinage; that while other nations were lapsing into that popular lethargy which is the sure outcome of unresisted despotism, Englishmen were more and more worshipping their laws; that when the tyrant James rated his judges because they would not admit him to their consultations, Sir Edward Coke exclaimed: "I will act as it becomes a judge to act;" that when to John Hampden an unconstitutional measure was proposed, he

declared: "I should be content but that I fear to draw on myself that curse in *Magna Charta* which should be read twice a year against those who would infringe it." How natural is it, therefore, that *Magna Charta*, the Petition of Right, and the Declaration of Right, should each glow with undying heat and with unfading luster in the Constitution of the United States. Great as the eulogist, lofty as the eulogium, it was then not true as Mr. Gladstone declared, that our constitution was a work "struck out in a given period by the brain and purpose of man," but on the contrary it is true that many of its vital basic principles had their origin probably as early as the fifth century after Christ under the oaken homesteads and amid the sand and heather of those hyperborean shores jutting into the North sea, the primeval home of the English race.

To the convention of 1787 many of the states had taken care to send the older patriots. First of all, George Washington. Of Franklin it might have been declared as Homer said of Nestor that he "had ruled over three generations of men and was as wise as the immortal gods." From that famous college at the capital of the Old Dominion, which had been named William and Mary, in honor of the royal pair who but a little while before had restored their ancient privileges to Englishmen, came John Blair. He had been a student of law at the Temple, was now Chief Justice of Virginia and was thereafter to become, by Washington's appointment, Associate Justice of the Supreme Court of the United States. There too was George Wythe, long a member of the Virginia House of Burgesses before the revolution. He had signed the Declaration of Independence. He was chancellor of the state. In his office two presidents, Jefferson and Madison, had acquired the rudiments of their profession. Another student of his was John Marshall. And afterward, an untutored youth from the slashes of Hanover county was admitted as his clerk, to absorb all the law he ever knew; thence to turn his face to the westward, to cross the blue Virginian mountains and in the heart of the Blue Grass, by winning and persuasive eloquence, by attractive and manly enthusiasm, to win the place of Henry Clay in the affection of his countrymen. There too was that incomparable pair, Hamilton and Madison. James Wilson, a graduate of the universities of Glasgow, of St. Andrews, and of Edinburgh. There too was the brilliant, fascinating and versatile Gouverneur Morris, to whose graceful pen is largely ascribable the lucid English of our organic law. Rutledge of South Carolina, like Blair of Virginia, read law at the Inns of court. Charles Cotesworth Pinckney, from the same state, educated at Oxford, had heard

those lectures of Blackstone, which found the English law a skeleton, and clothed it with life and beauty. He lived to confound the insidious greed of Talleyrand with the memorable expression: "Millions for defense but not a cent for tribute." My own state of Georgia sent its strongest delegate, Abraham Baldwin, a graduate of Yale, a tutor in that college, and the relative of another of the name whose copious and exact learning, discriminating mind, modest and manly example, we trust, under the Providence of God, may be spared long, for the administration of his country's laws, and for the training and uplifting in this noble institution of his country's youth.

It is of course quite impossible to mention all of the illustrious names in that famous body, but from Connecticut, and also from Yale, came William Samuel Johnson, the friend of Dr. Samuel Johnson, the great lexicographer, the intimate of Reynolds and Goldsmith, of Oglethorpe and Burke. There too was Oliver Ellsworth, a graduate of Princeton, subsequently appointed by Washington as Chief Justice of the United States. He, with Johnson, was the author of the Judiciary Act of 1789, as yet undisturbed as the foundation of our national judicial system. There too was Roger Sherman. Of all the members who signed the constitution this great man was the only one who also signed the other famous national compacts, namely: the Articles of Confederation, the Declaration of Independence, and the Association of 1774. Mr. Bancroft declares: "The master builders of the constitution were Roger Sherman, George Washington, Charles Cotesworth Pinckney, James Madison and Alexander Hamilton." The reputation of Roger Sherman for exquisite judgment is probably due to the fact that he would not if he could help it decide a doubtful or perplexing question without submitting it for the opinion of some intelligent woman. This great man had more than ordinary opportunity to consult the unerring intuitions of the womanly mind. He was twice married. His second wife was the beautiful Rebecca Prescott. It is related that on one occasion while visiting her husband at the seat of government she was invited to a state dinner by Washington and conducted to the table by the general himself and given the seat of honor on his right. When complaint was made to his secretary by Madam Hancock, that her rank entitled her to that distinction, the father of his country replied that he deemed it his privilege to give his arm to the handsomest woman in the room. History is discreetly silent as to the effect on the fair complainant of this executive explanation. Roger Sherman and his beautiful wife were the grandparents of two

illustrious men of our own times, the late William M. Evarts and the late George F. Hoar.

It would have been then, and would be now, difficult to assemble at Westminster Hall an assembly more distinctly English in blood than was the Constitutional Convention. Wherever the Huguenot strain appeared its possessor was quite as devoted as the English strain to the effective principles of freedom as perpetuated by the English law. The descendant of men and women who had escaped the swords and halberds of St. Bartholomew, or who had been exiled by the revocation of the Edict of Nantes, was not less fierce in his love of liberty than the descendant of those who had dared the storms of the North Atlantic in the Mayflower, or who at Dunbar had charged with Cromwell, when he shouted the battle prayer of the warrior king of Israel: "Let God arise, let his enemies be scattered." How inevitable was it therefore that these men should be so saturated with the spirit of the English organic law that it became the basis of our system.

As the mischief of the old constitution was weakness, the great desideratum of the new one was strength. As the old constitution operated on the states, it was determined that the new one should operate immediately through its courts and executive upon the people. As the weakness of the old constitution was ascribable to the fact that it had no implied powers, and no provision either for the enactment of laws to make its express powers effective, and no executive to enforce them, it is difficult to understand how the theory can be accepted that the great thinkers and jurists of the Constitutional Convention would conceive that the incidental powers inherent in government and especially the initiative of the executive, should be wholly disregarded, and that the letter of the constitution itself must be held as ample for all the exigencies which might come to the life of a mighty nation. It turned out that the first century in which this constitution was to be tried, witnessed a gigantic transformation by the use of steam and electricity in the instrumentalities of commerce, government and society such as the world had never known. Fortunate is it indeed that a majority of Americans have believed with Sir James McIntosh that "constitutions are not made, they grow;" that they held with Saint Paul "Not of the letter, but of the spirit; for the letter killeth, but the spirit giveth life." When the occasion arose even those leaders of strict construction, to whom that rule of interpretation was apparently as dear as Papal infallibility to the Holy See, swiftly pocketed their preformed conclusions, trampled on their own doctrines, with vigor and celerity, and as good

Americans should do, acted for the incontestable interest of the country.

The suppression of the Whiskey Insurrection in Pennsylvania by Washington was perhaps the first important instance of the presidential initiative. This convinced the people of the country for the first time that the government was not to be trifled with. It is almost forgotten, but had the president been a weak man, the consequences of the young nation might have been disastrous. But Washington never lost the opportunity to urge upon his countrymen to cultivate the independent national American spirit, and he had little mistrust of the executive power.

A very different man, with very different views, was Thomas Jefferson. He had maintained that the United States government had the *inherent right* to do no act whatever, and was the creature of the states, in union, and its act if not resulting from *expressly* granted power was no act at all, but void and not to be obeyed or regarded by the states. In the Louisiana Purchase he did then according to his theory of the constitution a void act, which was no act at all, and not to be obeyed or regarded by the states. This act however was to give to our country a power, prestige, and magnificence of which Washington perhaps had never dreamed. It added to our domain the vast territory from which have been carved many mighty and populous states. Napoleon had extorted from the Spanish crown retrocession of New Orleans and all that territory west of the Mississippi which was termed Louisiana, and which by a secret treaty had been ceded by France to Spain. The nominal consideration was a trifling Italian principality, the Duchy of Parma. With the mouth of the Mississippi under the control of that incomparable military genius, who had become the embodiment of French aspirations, it would not be long before our country west of the Alleghenies watered by the navigable streams flowing into the great river, would be at the mercy of an alien, intellectual, and antagonistic race. The embarrassment of President Jefferson was very great. So keen was his sense of danger that he at once wrote our minister in Paris: "The day France takes possession of New Orleans, we must marry ourselves to the British fleet and nation. We must turn all our attention to a maritime force, for which our resources place us on very high ground; and having formed and connected a power which may render reinforcement of her settlement here impossible to France, make the first cannon which shall be fired in Europe the signal for the tearing up of any settlement she may have made, and for holding the *two continents of America in sequestra-*

tion for the common purposes of the United British and American nations." Here for you, with a vengeance, are expansion, entangling alliances, and the national idea. But this is not all. On August 12, 1802, he writes to Breckenridge: "The constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our union. The executive, in seizing the fugitive occurrence, which so advanced the good of our country, has done an act beyond the constitution." To his cabinet he said: "I infer the less we say about constitutional difficulties the better, and that what is necessary for surmounting them, must be done *sub silentio*." The familiars of the great strict constructionist treated his apprehensions with marked indifference, and no Jeffersonian democrat, "republicans" as they were then called, questioned what the leaders of the party said. Randolph indeed affirmed that the United States government could lawfully incorporate Great Britain into the union, so far as the constitution was concerned, but added with some degree of superfluity: "We cannot because we cannot." Indeed it was an awful day for the theorists and doctrinaires, who denied to the government of the United States that substantial power, the acquisition of territory essential to the march of empire, which had characterized the government of our race from the earliest time, and which our colonial ancestors, and our government of recent years has so amply illustrated toward the aboriginal inhabitants of this country. For some generations the irreverent have perpetrated the old saw that the Pilgrim Fathers themselves, on landing, first "fell upon their knees and then fell upon the aborigines." And in Georgia we have a healthy body of anti-expansionists, whose grandsires, despite the treaties of our government with the Cherokee Indians, and solemn decisions of the Supreme Court of the United States, swiftly divested them of their vast holdings in that state, and sent these noble savages, to use the illustration of a Georgia evangelist, "humping down the road" toward the setting sun. It should be remembered also that when the Louisiana Purchase was made that the government framed for it by Mr. Jefferson's majority in Congress was in all respects monarchical, and Mr. Jefferson himself was constituted the monarch.

A disciple of Mr. Jefferson was President James Monroe. His exercise of the presidential initiative was quite as marked as that of his teacher and famous predecessor. Its effects upon the fortunes of our country have been perhaps not less significant. It was the preparation of that message containing those memorable words expressive of what since then has been termed the "Monroe Doc-



trine." It bore directly against the plans of hostile invasion to be directed by the Holy Alliance against those who were struggling for liberty in the southern continent of that hemisphere discovered by Columbus. It declared that we, that is the American people, "should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety." The succeeding proposition was more definite. It declared that the American continents, by the free and independent condition which they had assumed and maintained, are henceforth not to be considered as subjects for future colonization by any European powers. The initiative of the president was but expressive of the spirit of the people. Said an American historian: "he put the fire into those few momentous though moderate sentences and made them glow like the writing at Belshazzar's Feast." But for this or equivalent action, who can question that Mexico, Central and South America, the West Indies, the islands of the Caribbean sea, and our Pacific slope itself would have been parceled out and populated from the teeming millions, and marked by the militarism, the fortifications, the naval depots of that grand old world beyond the deep. Then a landing on our shores would have been as easy of accomplishment and as dangerous in result as that of the Norman conquerors on the shores of the English channel. The Monroe Doctrine is now incontestably a part of the unwritten constitution of our country.

The initiative of the president has not only saved us from serious and continued danger of foreign aggression, but also spared us for many years from the horrors of disunion and civil war at home. "Nullification," declared Professor Sumner, "was the triumph of metaphysical politics." There was nothing in Jackson's character which was antagonistic to the typical Carolinian. Indeed he had many of their attributes and shared many of their opinions. Besides in his address to the nullifiers, while there is no little doubt on the subject, he claimed that he was born within the borders of that famous state. There are, I believe, few men from any southern state who would deny that Jackson was fairly typical of our high-spirited, determined and constant people. Yet I cannot conceive it possible had he been president at the date of the presidential election in 1860, there would have been a serious attempt for the dissolution of the Union. Certain it is that in 1832 his prompt initiative quickly dispelled the metaphysical subtleties of Calhoun. That distinguished man from his place in the Senate introduced resolutions to the effect: "That the states are united parties to the constitutional compact, that

the acts of the general government outside of the defined powers given to it are void, that each state may judge when the compact is broken, that the theory of the people of the United States are now or ever have been united on the principle of the social compact, and as such are now formed into one nation or people, is erroneous, false in history and in reason." Jackson as a metaphysician was not the equal of Calhoun. He, however, promptly laid the premises of his argument by placing a force from the army and navy within striking distance and on December 10th, he issued his famous proclamation to the people of South Carolina. Of this paper Justice Story declares in the appendix to the first volume of his famous commentaries, "that it is entitled to very high praise for the clearness, force and eloquence with which it has defined the rights and powers of the national government." In a public meeting in Faneuil Hall, Daniel Webster, who did not admire Jackson, declared: "I shall give the president my entire and cordial support."

It follows that the initiative of the president in suppressing open and flagrant resistance to the laws of the United States, if need be by the use of the army and navy, became and remains a part of the unwritten law of the American Constitution.

Perhaps the most widely known exercise of the presidential initiative was the "Emancipation Proclamation" of President Lincoln. It is probably true that no man thought worse of the institution of slavery. But Mr. Lincoln's immortal mission was the preservation of the Union. No man knew better than he the temper of the intrepid population of the border states. While they were slave states, at the same time they had aligned the vast majority of their manhood under the flag of their fathers. It is sometimes forgotten perhaps that the southern states in white troops alone, including 3,530 Indians who were slaveholders, contributed to the Union an army twice the numbers of the French, Austrian and Russian armies combined, which sixty years before had met at Austerlitz. Of these the eleven seceding states gave 86,205, and Delaware, Maryland, District of Columbia, Kentucky and Missouri, 260,327 fighting men. About one-third of the officers of southern blood who had been trained at the Military Academy at West Point had from conviction of duty remained to share the fortunes of the stars and stripes. On the majestic fleet of Admiral Dupont which bombarded the Confederate forts at Port Royal, in high command was Percival Drayton of South Carolina. His brother, a brigadier-general of the Confederate Army, commanded the forts on shore. A Confederate, Major Lea, led the attack on Galveston in 1863, and his son, Lieutenant

Lea, was killed on the Harriet Lane. Two Crittendens, Kentuckians, were major-generals in the opposing armies. Colonel Breckenridge of Kentucky, at the battle of Atlanta, became the prisoner of his brother, a general of Confederate Calvary. No man better than Mr. Lincoln knew the character of this border state population. From little Delaware there was the oft-told story from Revolutionary times, how dead game were the "Blue Hen's Chickens." He had read the story of Smallwood's Maryland battalion of macaronies and dandies, who at Long Island under the eye of Washington, while covering the retreat of his shattered forces, stood upwards of four hours with firm and determined countenance in close array, their colors flying, the enemy's artillery playing on them all the while, but not daring to advance and attack them though six times their number. There too was the fighting strain, never in this world surpassed, of the men from the "dark and bloody ground," the land of Kenton, Harrod, Shelby and Boone, the land where the emancipator himself was born. There too were the rugged mountaineers of Western Carolina and Eastern Tennessee, a simple, stalwart and fearless people, ever idolizing the memory of Washington, who, whether they rode to slay Ferguson and his Tories at King's Mountain, or hurried to the side of Jackson to shoot down the regulars of Packingham at New Orleans, or to Sam Houston at San Jacinto to scatter the army of Santa Anna and wreak a bloody revenge for Goliad and the Alamo, were Americans to whom no other flag was ever comparable to the stars and stripes. To hold such men, to hold the powerful state of Missouri to a swerveless support of that flag, was the necessity, the duty to which Mr. Lincoln consecrated all the intuitions of his mighty statecraft, all of that knowledge of the people by which he has not been surpassed by any man entitled to the name American. He knew—no one more clearly—that the "Emancipation Proclamation," before it was truly necessary to the salvation of the Union, would be probably to withdraw from the Union cause the fighting power which these Union men of slaveholding states against the influence of long habit, kindred, state pride, brethren in blood, were yet devoting to its salvation. About this time Horace Greely through the *New York Tribune* addressed to the president what he termed the "Prayer of Twenty Millions of People." Of this great newspaper it was said by one who knew, that it was in closer touch with the active loyal sentiment of the people than was even the president himself. To Mr. Greely's editorial "petition" Mr. Lincoln thought proper to make public reply: "As to the policy I seem to be pursuing as you say," he wrote, "I have not meant to

leave any one in doubt. I would save the Union. If there be those who would not save the Union unless they could at the same time save slavery, I do not agree with them. My paramount object is to save the Union, not either to save or destroy slavery. If I could save the Union without freeing any slave I would do it, and if I could save it by freeing all the slaves I would do it. If I could save it by freeing some and leaving others alone I would also do that. I shall do less whenever I believe what I am doing hurts the cause and shall do more when I believe doing more will help the cause. I intend no modification of my oft-expressed wish that all men everywhere could be free."

All the while the Emancipation Proclamation had been written. It was lying in his desk when he was writing to Horace Greely. Finally, late in July or early in August, 1862, he informed his cabinet that he was going to communicate to them something about which he did not desire them to offer any advice since his determination was taken. He was advised by Mr. Seward to await a military success. The battle of Antietam did not serve the purpose with entire completeness, but it was made to do. Mr. Lincoln afterwards said: "When Lee came over the Potomac I made a resolve if McClellan drove him back I would send the proclamation after him. The battle of Antietam was fought Wednesday, but I could not find out until Saturday whether we had won a victory or lost a battle. It was then too late to issue it on that day, but on Sunday I fixed it up a little and on Monday I let them have it."

It is I believe little understood, especially in that portion of our country where I live, that this illustrious American even now, again returned to the plan which he had ever urged for gradual compensated emancipation, and the colonization of the emancipated negroes. According to his plan it would do away with slavery entirely by the year 1900. It would make emancipation a voluntary process instead of a severe war measure; it would inflict little if any loss on the slaveholders. It would restore good feeling. All it would cost, he urged, would be less than the additional cost of the war. It is much, very much, he said, that it would cost no blood at all. That the country did not listen to him was not his fault. A bill passed the House appropriating ten millions of dollars to compensate the slave owners of Missouri. The Senate amended by making it fifteen million dollars. The Missouri delegation defeated it. These statesmen were personally acquainted with the slaves, but had not seen the bonds. Mr. Lincoln was greatly disappointed at its failure. He said that bonds were better than bondsmen and that two-legged

property was a very bad kind to hold. He had hoped that Missouri would lead a procession of slave states, accept payments for their slaves, and reassume their positions in the reunited country. And so it was; instead of six per cent bonds of the United States which were offered them, the people interested retained an asset whose value it was soon seen was liable to some depreciation. Thus it is made clear that the initiative of the American president had reclaimed fifteen millions of men from bondage. It incorporated into our constitution the spirit of the ancient law of England. This in the language of Curran makes liberty commensurate with and inseparable from the British soil: "No matter in what language his doom may have been pronounced; no matter what complexion incompatible with freedom an Indian or an African sun may have burned upon him; no matter in what disastrous battle his liberty may have been cloven down; no matter with what solemnities he may have been devoted upon the altar of slavery; the first moment he touches the sacred soil, the altar and the god sink together in the dust; his soul walks abroad in her own majesty; his body swells beyond the measure of his chains that burst from around him, and he stands redeemed, regenerated and disenthralled by the irresistible genius of universal emancipation."

Nor, let me add, does there remain a trace of regret or resentment for such emancipation in the hearts of the people whom I love, and among whom in my far Southern home it is my happiness to live.

In nothing does the stupendous power of our national government so plainly appear as in the swiftness and completeness with which the mandate of the president is obeyed. Even by that "many-headed monster, the mob," he is instantly acknowledged as the representative of the power and might of the American people. And nowhere in our country was this made more plainly apparent than by the instantaneous submissiveness of the rioting and destructive thousands of Chicago, under the quiet but resolute intervention of President Cleveland. In the Debs case this power was discussed by the Supreme Court of the United States. Said Justice Brewer for the court: "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or transportation of the mails. If the emer-

gency arise, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws."

Much was said of usurpation on the part of the president. Little concern did this awaken. Well do the American people know the exigencies of modern commerce and intercommunication between the people of the states. They know that wherever interstate commerce goes, there goes the power of the Union. They know that lawless obstruction of their shipments in transit may inflict upon them calamities for which there can be no adequate redress. They are well aware that state sovereignty, however attractive in theory, or formidable in expression, ceases to be operative as their products on the way to market are rolled over the state lines. Not with dismay, but with exultation then, does the Georgia planter or fruit grower, or the New England manufacturer, reflect that his bales of cotton and his carloads of fruit or machinery are under the direct and protective initiative of the president, and will in need be guarded by every bayonet that gleams around the flag. They believe with James Madison and thank God for the demonstrated fruition of the belief that the government of the Union is an institution to make people do their duty. And they are coming to know that of all others the president himself—and this is the mighty source of his influence and power—is the direct representative of all who are sheltered or inspired by the flag of the freeman's home and hope.

When the fires are drawn from the mighty furnaces, when the hum of machinery is voiceless, when the ringing anvil and the hammer and the saw are silent, when strong men stand idly in the streets, when age and infancy, all unaided, shiver with the winter's cold, when in homes of the plain people where once there was simple comfort and ample food, the father and mother hear the wailing of the little ones, and gaze with tearful eyes on their pinched and pallid features and know that no help can come, that the strike is on, that the fight is to the death, when will it ever again be denied that the American president may not offer his temperate counsels, that he may not bring the quiet but all-powerful and righteous influence of his mighty station to accomplish a just arbitrament, at once to rescue the perishing poor, and win the approbation of that resistless public opinion for those industries whose prosperity is essential at once to capital, to labor and to the nation as well.

Our convention for the construction of the Isthmian Canal had been held up by Andean caterans at Bogota. Through the prompt and possibly the indignant initiative of the president, the deliberate approbation of the Senate, and the voice of the people expressed

through their representatives, the thronging marts of commerce along the Atlantic coast, as if by some cataclysm of nature, will be transported fourteen thousand miles nearer to the unsupplied millions of the Orient. We will, as said by another, "project the Pacific into the heart of the continent." We will save ten thousand miles in distance and fifty days by steamer between New York and San Francisco. We will subtract the entire width of the Pacific from the distance by ship from New York or Boston to Hongkong or Yokahama. In time of need our steel-clad fleets which sweep either ocean may be swiftly concentrated to protect the people of either American coast.

Where in the annals of time is recorded a precedent like this? "The people of Cuba," said the president, "having framed a constitution embracing the foregoing requirements and having elected a president who is soon to take office, the time is near for the fulfilment of the pledge of the United States to leave the government and control of the island of Cuba to its people." *Cuba libre*, whose last defender had sunk beneath the Spanish sword, whose piteous reconcentrados by the thousands had starved in corrals of barbed wire, with pestilence banished, with sustentation given, clothed and in its right mind, yet sheltered by his golden plumes and guarded by the eagle's restless glance, takes its place among the redeemed and disenthralled nations of earth.

The establishment of civil government in the Philippines; the revocation of the Clayton-Bulwer treaty; the firmness and skill which spared irresponsible Venezuela the ravages of destructive war with Germany and Great Britain; the settlement of the Alaskan boundary which for nearly a generation had threatened the peace of the country; the maintenance of the integrity of China and of the open door for our commerce in the East; the impartial and effective counsels offered in the Moroccan Conference; the initiative taken for the protection of the territorial integrity of that empire; the restriction of the arena of combat in that fearful struggle; the protection of the helpless and pathetic millions of China from the devastating swarms from the Northern hive; all begun by the president's initiative, or with his approval, and executed in effective detail by the accomplished statesmen he has gathered around him in the cabinet; surely these great measures, or indeed any of them, will amply justify the surpassing acclamation recently accorded him by a proud and grateful people.

That he has detractors, as bitter as unrestrained, is true. This for a time is the reward of most who confer blessings upon their fel-

low men. That he has had embarrassments for the time distressing is also true. The cause is not obscure. Had the measures against the whisky insurrection been given in control to Albert Gallatin, the Monroe Doctrine to the Holy Alliance, the suppression of nullification to John C. Calhoun, the conduct of the war to Clement L. Vallandigham, a righteous people may conclude that embarrassment might have confounded or detraction assailed the blameless purposes and unstained honor of a Washington or Monroe, a Jackson or Lincoln. And what is the result? It is known of all men. It is the enactment of a series of mighty measures of legislation, the determination of the character of the Isthmian Canal, the creation of a national quarantine, the effective control of rates for interstate transportation, the pure food law, and the meat inspection law, vital, salutary, enduring in their effect, rivaling, if not surpassing the most practical accomplishments of government in any country or in any age, and all, against opposition the most powerful, accomplished in a half session of one Congressional term.

One other illustration and I have done. On antipodean soil and waters, less than a year gone, Russia and Japan were in the deadliest grapple of furious and murderous warfare. While the conflicts have been frequent, and the slaughter terrible, between the opposing armies there is yet little disparity of numbers. On one side are arrayed the huge men of that fierce Slavonic race, from whose regions of ices and snows in centuries past many devastating armies have gone forth to prey on fairer lands. Said the historian, Alison: "The meanest peasant in Russia is impressed with the belief that his country is destined to subdue the world. The rudest nomad of the steppes pants for the period when a second Timour is to open the gates of Durbend and let loose upon Southern Asia the long pent-up forces of the northern wilds." In 1842 the same historian predicted that in 1900, Russia would have a population of 120,000,000. In 1900, its population was 136,000,000. It is a brave and warlike people. The thunder of their artillery in the environs of Paris sounded the death knell of Napoleon's empire. They have tethered their horses and kindled their bivouac fires in the garden of the Tuileries, and amid the ancient ruins which encompass that famous city on the Golden Horn, which had witnessed the decline of the Roman, and the rise of the Moslem empire. Confronting them were the forces of the island kingdom, the little brown men of Nippon. To declare of that marvelous army that its officers and privates were heroes to a man, is but imperfectly to state the fierce love of country, the hunger for military glory, the strange joy in battle, and the terribly efficient



skill with which these intrepid islanders handle the deadliest weapons of modern war. To the amazement of the world, in not a single conflict have they been defeated. Their torpedo squadron dashes into Port Arthur and shatters the battleships of Russia. Their unintermitting assault upon that Gibraltar of the East destroys its exterior defenses. Inch by inch, and foot by foot, with bayonet, rifle and hand grenade they drive the Russians into their interior lines. By desperate and successive advances their guns now command the harbor of the besieged city. They sink the last of the Russian fleet and Port Arthur falls. The entire force of Japan is now concentrated upon the Russian army in the field. No skill of scientific entrenchment, no hail of explosives, no mitraille from machine gun, shell fire, or rifles stop the little brown men. They drive the gigantic Russian army from Mukden, the ancient city of the Tartar kings. Russia is now fighting for its very life. Vladivostok, proudly named "Dominator of the East," is in danger. In the meantime the last fleet of Russian battleships has come around the world to raise the blockade of Port Arthur, and to sever the army of Japan from its base of supplies. But there is Togo. In swift encounter, gunfire, torpedo fire, hiss of shells, roar of bursting boilers, explosions of magazines, cries of the dying, the Russian fleet sinks beneath the waters of Japan. The world stands aghast. Then intervenes the great impulsive heart, the immovable will, the mighty influence of the president of our country. The belligerents hear his benignant offer, his unselfish prayer. An armistice is declared. The plenipotentiaries meet in a quiet New England town. At times it seems as if all efforts are vain. The president perseveres. From his own simple home he is in constant touch with the representatives of Russia and Japan, with the emperor and the czar. He imparts to them a share of the broad, kindly and humane motives which inspire him. The nations of the world, with expectancy beyond compare, regard the unwonted scene. With the sympathy of a mighty people and the prayers of good men of every faith, it is not possible that he shall fail. And finally, the triumph for humanity comes, and peace to bleeding, starving and agonized millions.

The measure of his reward is the comforting assurance of the gentle Master: "Blessed are the peacemakers for they shall be called the children of God." And as it upheld him, gave him all confidence and trust, and sustained him, in that reward his country shall ever share. "Length of days is in her right hand, and in her left hand riches and honor. Her ways are ways of pleasantness and all her paths are peace."

*Hon. Emory Speer.*

## THE HARTER ACT AND BILLS OF LADING LEGISLATION.\*

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### I.

At the last Conference of the International Law Association, held at Christiania in September, 1905, Professor Oscar Platou presented an interesting paper on the legal relations between charterers and shipowners. He proposed as a matter for discussion a resolution passed by the Commercial Congress in Copenhagen in 1903, which was to the following effect:

"That efforts should be made to pass a law, which should enact:

"That all contract clauses in bills of lading, charter-parties and similar agreements respecting maritime conveyance, purporting to limit or nullify the ordinary rules of law respecting the liability of shipowners for due care in providing for the seaworthiness, the outfit, manning and provisioning of the vessel, and likewise in the reception, stowing, dunnaging, separation and delivery of the goods, shall be invalid, whether the contracts be made here or abroad, and even when reference is made in such documents to foreign laws or customs."

He added that there would be no objection to make stipulations in such a law, as has been done in the Harter Act, once for all relieving the owners of liability in respect of the so-called nautical errors—that is, errors on the part of the masters and crews with respect to navigation; but so that it be sharply and precisely defined that the owner's liability for proper treatment of the goods will in no way be affected thereby.

In the course of the ensuing debate, Mr. Douglas Owen expressed himself to the effect that he personally should rejoice to see legislation on lines similar to the Harter Act introduced into British legislation. But, he said, it was scarcely probable that the British legislature could be induced to interfere until there happened certain strong cases appealing strongly to the public sense of right and justice, which might call for legislation in the sense indicated by Mr. Platou. Until then, he thinks, we shall have to make

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\* This paper was read by Dr. Sieveking at the Berlin Conference of the International Law Association, Oct. 5, 1906. [Ed.]

up our minds to go on as we are going. And what he would like to see was an alternative bill of lading—the one bill of lading much on the present lines, in which the shipowner is liable for nothing except to receive his freight in advance; the other, in which, in consideration of a higher freight, the shipowner accepts liability for damages arising out of ill-treatment of the cargo. A resolution was then submitted to the conference, to the effect:

“That there is a demand for compulsory clauses in charter-parties in the same direction as those indicated in the United States Harter Act with regard to the legal relations between charterer and shipowner.”

Twelve votes were given in favor of this resolution and twelve against it, whereupon the resolution was lost by the casting vote of the chairman.

This result of the debate shows that the important questions which formed the subject of the discussion have as yet not met with a decisive solution, and this circumstance alone would suffice to justify another word on the subject. Another reason for my taking up the discussion is that it seems expedient to bring to the knowledge of this association two facts, which, it is true, have been alluded to already at the Christiania meeting, but which deserve a somewhat more extensive explanation.

## II.

The first of these facts is the result of an International Conference of Underwriters, held in Paris in 1900. This conference was attended by a great number of representatives of marine insurance companies from Paris, Havre, Hamburg, London, Berlin, Mannheim, Milan, Liverpool, Copenhagen, Antwerp, St. Petersburg, Gothenburg, Stockholm, Amsterdam, Rotterdam, Turin, Bâle, Zürich. In his address to the conference the president pointed out that, in consequence of the underwriters having accepted their liability for damages to or loss of goods shipped under bills of lading which contain the negligence clause and the other usual exonerating clauses, the insurance on goods, whose original purpose was to cover accidents of the sea only and accidents of navigation arising out of faults of master and crew, had come to protect the shipowner against “commercial faults” committed by his agents and employees in the fulfilment of contracts entered into by the shipowner. This extension of liabilities, so the president argued, ought to be abolished because it led to this, that the fulfilment of contracts which were destined to secure a safe transportation of goods was neglected, and the

responsibility for the carrying out of such contracts was taken off the shoulders of those to whom in law and equity it should attach.

The result of this conference was that a resolution was unanimously adopted to the following effect:

"The conference resolves that in policies on goods the following clause be inserted:

"The insurers on goods do not take at their charge the consequences of clauses inserted in bills of lading or charter-parties which relieve the shipowner from his liability for commercial faults of master and crew, such as are referred to in the United States law called the Harter Act of 13th February, 1893.

"The insurers accept the clause exonerating the shipowner from nautical faults committed in the navigation of the vessel."

Moreover, it has been unanimously resolved to establish committees at the different local centers of marine insurance business, with a view to communicate with each other, and jointly to examine all questions of common interest, as well as to realize the execution of the adopted resolution.

The carrying out of the aforesaid resolution has been postponed for a short time, in order to await the result of a movement which shortly afterwards was brought about with the view of inducing legislatures to interfere.

This movement is the other fact of importance in the consideration of the questions with which I am dealing.

### III.

In a Conference of French Shippers held at Marseilles in October, 1902, certain resolutions were adopted, which, later on, were adhered to by a large number of French Chambers of Commerce and other bodies representing various merchants and mercantile societies of France. These resolutions recommended the adoption of a law allowing shipowners to decline their liability for nautical faults of master and crew, and prohibiting them from declining such liability for commercial faults of the shipowners' employees in the carrying out of affreightment contracts.

A mixed committee, consisting of French shippers and shipowners, met at Paris in May, 1903, to consider the question. In this committee the shipowners brought forward a proposal which had already been made by the Delegates of the Syndicates of French Shipowners as far back as 1896, viz.: an alternative bill of lading, the one containing the full legal liability of the shipowner; the other containing the exonerating clauses. The former to be handed to the shipper, as a rule, in case of no special agreement as to the

freight having been made; the latter to be framed according to the special stipulations agreed upon.

This system of a double bill of lading has been actually put into practice by some French shipowners. But it appears that French shippers seldom choose the bill of lading containing the full liability, but generally prefer the bill of lading charged with the exonerating clauses. This seems to be the natural consequence of the fact that as long as the shippers are protected by insurance there is no reason for them to refuse the bill of lading with exonerating clauses.

The shippers, not being satisfied with the offer made by the shipowners, continued their efforts to bring about an intervention of legislation, and in February, 1904, an interministerial committee was appointed by the French government, and ordered to examine whether it was advisable to modify the existing French law with regard to bills of lading. The committee met under the presidency of Mr. Durand, member of the French Cour de Cassation, and contained ten other distinguished lawyers, government officials and merchants. The committee has heard the views of Delegates of French Shippers, Delegates of the Central Committee of French Shipowners and Delegates of French Underwriters.

The shippers accepted the clauses exonerating the owner from liability for neglects and defaults of master and crew in navigating the vessel and the underwriters declared their willingness to submit to such clauses. So far as these clauses were concerned there appeared to be no reason for a change of the existing law, which allows the inserting of such clauses in charter-parties or bills of lading.

Difference of opinion, however, arose as to the liability for so-called commercial faults of master and crew and other employees of shipowners. The shippers objected to the clauses exonerating the shipowners from liability for loss or damage of goods caused by negligent storage, by theft, or by the neglect of proper care in the fulfilment of such duties as in all contracts must be performed by paid employees. They argued that by these clauses negligence was encouraged, that in fact they amounted to a premium on negligence, and even on fraud. They declared that it was contrary to law and equity, that shipowners should be allowed to leave the goods on quays or in lighters, before shipment or after discharging, at the risk of the shippers or consignees, for a certain time, say for the interval between the departure of one vessel and that of the next following of the same line; and further objected that shipowners, by clauses in the bills of lading, were allowed to keep goods on board for several

successive voyages, or to discharge them at a port beyond the port of destination, and to return them at the risk of the shippers or consignees, instead of properly delivering them at the port of destination; that clauses in the bills of lading allowed the shipowners to tranship the goods into other vessels, even foreign, and not belonging to their own line, and of an inferior class, and without notice to the parties interested—to load goods on deck without notice given to the shipper—to bring into general average damages suffered by engines and expenses of lighterage caused by the vessel coming aground without an imminent peril—to limit their liability arising out of belated delivery to cases of a delay exceeding three or four months, and to a certain low amount—and generally to decline all and every liability for faults and neglects of their employees, master and crew or others.

The shippers also represented to the committee that they were unable to make agreements to a contrary effect, owing to the power of the shipowners and their faculty of combining amongst themselves; that part of the enumerated risks, *e. g.*, the risk of delay in delivery, could even now not be covered by insurance, and that if the resolutions taken at the Underwriters' Conference at Paris in 1900 were put into effect they would be unable to protect themselves by insurance against all those risks. Further, that, apart from this, it was no argument against their reasoning to say that they could protect themselves by insurance against wrongs illegally suffered by them, and that it would be unjust to say that without an international agreement the question could not be settled in the way proposed by them because the experience of the Harter Act showed that national legislation could interfere without any prejudice to the interests of the national shipowners. On the contrary, the continuance of the present state of affairs would seriously prejudice the interests of the national shipowners because the shippers would be led to prefer the flags of such countries where clauses of the nature described were not in use.

The underwriters on cargo, in a memorandum presented to the committee, declared that, although they took a lively interest in the debate because whatever served to diminish their risk would only be welcome to them, still their position was simply this, that if the movement proved abortive, they would put into practice the resolutions adopted at the Paris Conference in 1900, and thus free themselves from liabilities which, according to law and to the nature of marine insurance, ought to rest on the shipowners and not on the underwriters on cargo.

The shipowners gave the following reasons for opposing the demands of the shippers. They said that they had offered the alternative bill of lading—the one covering the so-called commercial faults of a somewhat higher freight—and that this was all the shippers could in equity desire. If the shippers refused to accept this offer, they would have to insure the risk of the clauses, and they certainly would be able to do it because the underwriters, owing to the competition of foreign, especially British, insurers would never be able to carry out their threats to discontinue the insurance of those risks. If, on the other side, the proposed reform by legislation were adopted, the French shipowners would be prejudiced in favor of the underwriters, the greater part of whom, moreover, were foreign underwriters, and of foreign shipowners. Finally the shippers themselves would be the sufferers because by impeding the development of export and import of goods from and into French ports they would deprive themselves of facilities for procuring the goods required for their industry and for creating markets for the sale of the produce of their industry in foreign countries.

#### IV.

The committee, after a careful examination, arrived at the following conclusion:

"That it is not advisable to alter the actual law on bills of lading, for the reasons: that public order does not in this respect require an interference with the principle of liberty of contracts; that, in the present condition of the relations of maritime commerce, it is always possible to meet the inconveniences arising out of the irresponsibility of shipowners, either by the alternative bill of lading, or by insurance in its various forms; finally, and above all, that the proposed reforms would lead to serious difficulties with regard to international law, and that, from a commercial point of view, they would place the French shipowners in an evidently inferior position as regards foreign shipowners, so that without the concurrence of all other nations the proposed reform evidently cannot be realized."

The reasons by which the committee has been guided are laid down in a report drawn up by Mr. Rousseau, Avocat à la Cour d'Appel de Paris, dated Paris, March 19th, 1906. The following is an abstract of his report:

First of all there is no reason for an alteration of the law regarding sailing-vessels because the complaints are made against the steamship owners only, nor of the law regarding charter-parties because the complainants themselves acknowledge that as far as regards the negotiation of an affreightment by charter-party no

protection of the merchant against the principle of liberty of contracts is required. It is on bills of lading only that the dispute turns because the merchants say that there is no possibility for them to contest the bill of lading clauses, and that practically the shipowners in this respect enjoy a monopoly.

It has then been considered that at present—with the sole exception of the United States and of Australia—the clauses of irresponsibility are universally in use. This seems to prove that commercial necessities have led to such a situation. It is a fact that in the course of the last twenty or thirty years freights have gone down very considerably, so much so that on some routes the freight is but five per cent of what it was formerly. Besides this deterioration of the position of a shipowner, the modern changes in navigation and naval industry have brought about new risks. It is against these risks that the shipowners want to protect themselves by the clauses of irresponsibility. The proposed reform would enhance the risks of the shipowner and lead to the necessity of their covering these enhanced risks by insurance, and, in order to cover the costs of insurance, to raise the freight rates. If they did not do so, they would evidently be at a disadvantage compared with foreign shipowners. If they did so, French shippers would avail themselves of foreign ships for transport of their goods, and thus contribute to ruin the French commercial navy, or, if they did not do this, the increase in the costs of exporting and importing goods would damage the producing industry of the nation. Therefore it clearly appears that the reforms, if necessary, could be brought about by international legislation only, agreed upon by all, or at least the six or seven leading maritime nations.

The report then goes on to examine the difference between navigation now and in former times. Formerly, the value of ships, as well as cargoes, was vastly inferior to what it is now. Consequently the risks incurred by the shipowners were less. Besides, vessels now are of so complicated a structure and require such numerous and often changing crews that the risk of accidents is increased and the possibility of controlling the crews considerably impaired. Cargoes must be stowed and discharged with an ever-increasing haste. In intermediate ports the necessary shortness of the stay prevents a careful control in the taking in and discharging of cargoes. The work goes on day and night. Bad weather in open roadsteads augments the difficulties. Occasions are more numerous for theft and damaging of goods. Shipmasters must be chosen amongst those who have passed the examinations required by law; therefore, it



would be a hardship to make the owner liable for the master's management of commercial affairs to which he has not been educated. As to the crew, they are not able to judge of what is required for a safe navigation and for a proper stowage. As to short delivery of goods, it must be taken into consideration that frequently shippers pretended to have shipped goods which, in fact, had not been delivered on board, and that the master and crew of a vessel taking in or discharging cargo out of four hatches are unable to control the proper delivery. Lastly, it must not be overlooked that, notwithstanding the clauses in the bills of lading, the shipowners often voluntarily agree to pay for damages or losses not covered by their guarantee, so that the necessity of reform does not appear to be so urgent as it is made by the shippers.

The so-called monopoly of the shipowners is next considered. The committee were of opinion that the alleged monopoly did not exist. The shippers can apply to other shipowners. They can, by their combined efforts, start steamship companies themselves. It is not true that the bills of lading are forced upon the merchants. They are known to the merchants and are frequently modified. It often happens that several steamship companies try to come into business with a shipper of goods, and the shipper avails himself of this competition in order to secure advantages for himself. The enormous abatement of freights also proves that there is no monopoly because, if the shipowners had a monopoly, they would have been able to keep up the high freights. It is notorious that competition has reduced the freights so much as, in many cases, scarcely to leave to the shipowner the means of paying his expenses.

Then, as to the encouragement of negligence and fraud, the report proceeds to say that this argument is not a sound one. Competition is a sufficient safeguard against these dangers. The owner who does not take care to prevent, as far as possible, the occurrence of losses and damages will soon lose his clients. The exonerating clauses do not make it to the interest of the shipowner to have the goods lost or damaged. Negligence in the control of their employees would make the shipowners liable, notwithstanding the clauses.

The committee, for these reasons, conclude that the principle of public order does not require the prohibition of exonerating clauses. The shipowner who confides his ship to the master risks the loss of his ship; similarly the shipper risks the loss of the goods confided to the master. The shipowner protects himself by insurance; similarly the shipper may protect himself by insurance. If he chooses not to do so, he is his own insurer.

A law which prohibits the exonerating clauses could not prevent the consequence, viz.: the raising of freight rates in proportion to the greater risks incurred by the shipowner. This surplus of freight is equivalent to the insurance premium which the merchant has to pay if the risks are not covered by the shipowner. It follows that there is no sufficient reason for legislation instead of leaving the solution of the conflict between the owner and the merchant to the general law of economy. The legislator's duty is only to protect a person who invokes his protection against fraud and the clauses of irresponsibility cannot be considered to be a fraud to the prejudice of the merchant.

At any rate, all reasonable demands of the shippers are met by the offer of an alternative bill of lading. The surplus of freight stipulated by a French steamship company, the "*Compagnie de Navigation Mixte*," in 1897, amounted to Ofr. 88c. à 1fr. 54c. per cent of the declared value; which seems to be but a moderate charge.

The report then proceeds to an examination of the Harter Act and the Australian Act relating to the sea carriage of goods of 15th December, 1904, which is, on the whole, a reproduction of the Harter Act with some slight alterations. The Harter Act, it is said, leaving alone the wording of the law, which might be amended, cannot be considered as an example which should be followed. The conclusion drawn from the fact that the Harter Act has not injured the development of the American trade or naval industry is not decisive because there are many concurring and always-changing reasons for this development between which it is hardly possible to distinguish, so as to ascertain whether any and what part is attributable to the law in question. It must be considered that the United States law, previous to the passing of the Harter Act, held the shipowner responsible not only for the so-called commercial but also for the nautical faults of the master and crew, and, therefore, in this respect, the Harter Act alleviated the responsibility of the shipowner. The clause by which the Harter Act prohibits certain exonerating clauses has in view, as is proved by the debates on the Bill, to protect the American exporters of grain and flour against foreign transporters so long as there is no American mercantile navy to carry out these transports. The national flag of the United States carries ten per cent only of their international sea transports. A committee of members of the Senate and the House of Representatives has been appointed to suggest remedies, and has arrived at the conclusion that subsidies were necessary to ameliorate the condition of the American shipowners. It is, therefore, not advisable to intro-

duce the legislation of the United States into countries where the relations of commerce and navigation are entirely different from those in the United States.

Lastly, the question is considered from the point of view of the underwriters. And here the committee comes to the conclusion that, as far as the underwriters are concerned, the question simply comes to this: "Who is to pay the premium of the risks, the shipowner or the shipper?" And this, the committee says, is a question between private interests only, which does not justify the interference of legislation in a sense contrary to the principle of liberty of contracts.

#### V.

This report, of the main contents of which I have given a short abstract, presents to our eyes a vivid picture of the stage at which the movement which, for upwards of twenty years has engaged the attention of the commercial world, has at present arrived. It introduces the interested parties—the shippers, the shipowners, the underwriters. We hear their arguments. We learn what judgment, after the hearing has been delivered by a body of eminent men directed to investigate this question by the government of a commonwealth which takes the highest rank amongst civilized nations. Thus we are enabled to form a judgment ourselves on a question which, for a long series of years, has occupied the attention of this association also.

First of all, the question is formulated in a more precise form than has been done before. The question is whether legislation ought to interfere with the principle of liberty of contract by prohibiting certain clauses in bills of lading issued by steamship companies. There is no question about sailing-vessels; as to these no complaints are made. There is no question about charter-parties; as to these, also, no complaints are made. The clauses which are objected to by the shippers can be particularly specified. They are not the clauses which, since olden times, figure in the bills of lading, viz.: the clauses, "the act of God, enemies, pirates, and perils of the seas excepted," and the clauses, "weight and contents unknown." Nor are they the more recent clause, "not responsible for fire on board, collisions, strandings, explosions, or other accidents of navigation, even when occasioned by negligence, default, or error in judgment of the pilot, master, crew, or other servants of the shipowner, nor for damage done on land, nor for obliteration, errors, insufficiency or absence of marks, numbers, address, or description," or similar clauses.

The clauses objected to are those which exonerate the shipowner from liability for loss or damage on goods arising from negligence, fault, or failure of the master, officers, agents, or servants of the owner in proper loading, stowage, dunnage, care, and proper delivery of goods committed to their charge. In other words: "The shippers want the owner to be and remain responsible for all losses and damages on goods happening in the time between their delivery to the master, or officers, or servants of the owner, and the delivery to the consignee, except such as result from acts of God, or accidents of navigation, even if caused by the negligence of the master, officers and crews, or pilots, or other persons employed by the owner in the navigation of the vessel."

Thus the owner would be responsible for thefts, for want of due custody whilst the goods received are stored in sheds or lighters before being charged on board or delivered to the consignee, for bad stowage and dunnage, for want of proper care in ventilating during the voyage, for wrong delivery or non-delivery or late delivery at the port of destination, for the risks of transshipment, and for loading goods on deck without previous agreement with the shipper.

The question, therefore, is: Whether it is desirable to bring about a law which compels the shipowners to bear these responsibilities.

It seems to be clear that such a law, if given, could not be given by a single nation, but must be an international law. The shipowners, if prohibited from declining the responsibilities in question, must be allowed to raise their freights. This would prejudice the national merchant navy of the particular state. An agreement between the seafaring nations—at least, the principal amongst them—would, therefore, be indispensable.

This, however, is no reason for not trying to bring about an international law. The question, therefore, remains the same as stated above, only that the words, "an international law," must be substituted for the term, "a law," used above.

The only reason, in my opinion, why such a law could be deemed advisable, would be this—that the principle of public order required the law. This could be said only, if public interests suffered in the present state of things. This would be the case, if disorders of a public character—crimes or fraud—were the consequence of the present state of things, and could be prevented or diminished by passing such a law, or if the law were necessary or, at least, useful for preventing a loss of national wealth which arises from the present state of things.

Both arguments, indeed, are brought forward by the partisans of the proposed reform. It is said that thefts and embezzlement of cargoes are encouraged by the masters and crews knowing that their owner cannot be held responsible, and therefore will not dismiss them on account of their misdemeanors. Professor Platou mentions the case of the steamship, "General Gordon," which arrived at St. Nazaire with a cargo of wheat, part of which was discharged, but the remainder clandestinely taken away to sea by the master. And it is said that the negligence of the owner's servants in handling the cargo is encouraged by the negligence clause, and thus values are lost which form a part of the national wealth. It is also said that the bills of lading are discredited by the negligence clause.

These arguments, in my opinion, are not of a nature to justify the proposed legislation. To support them, it must be proved that thefts and embezzlements have increased in number in consequence of the introduction of the negligence clause, and that, by prohibiting this clause, they will diminish. This, as yet, has not been proved. It also seems to be highly improbable that the crew of a steamship will be prevented from committing a theft by reflecting that, by committing such a crime, they will damage the owner. The master of the "General Gordon" would have sailed with the cargo just as well, if the negligence clause had not been inserted in the bill of lading. Nor can it be said that the negligence clause encourages masters and crews to commit thefts and embezzlements by leading them to think that the owner will not dismiss them because he suffers no damage. For every steamship company will most certainly dismiss such rogues, whether they be responsible for the damage done by them or not. And as to the credit of the bills of lading, it would have to be proved that the bankers who give their acceptance against bills of lading covered by insurance policies—and other bills of lading, as far as my knowledge goes, are not presented to bankers—distinguish between bills of lading without a negligence clause and bills of lading with a negligence clause. This proof, as yet, has not been given. Then there is the negligence in stowing the cargo, in providing proper dunnage, and caring for the cargo during the voyage, *e. g.*, by ventilation. It must be granted that the stowage, the dunnage, and the care for the cargo, will be better attended to, if the stevedores and the people on board know that the owners must pay for the want of such attention. But, in order to justify legislation to interfere, more than this is required. It must be shown that a waste of goods is, in fact, caused by bad stowage, or dunnage, and bad ventilation, and that the owners do not do their utmost to pre-

vent such waste. The former fact has, as yet, not been proved, and, as to the latter, experience, as far as I know, shows that the big steamship companies all over the world do what is in their power to provide means for a careful handling of the cargo, as well as for good stowage and proper dunnage.

There is another question which must be considered with regard to the stowage, dunnage, and the handling of the cargo during the voyage. Do not these duties of the master and officers belong to what is called navigation, and is not, therefore, a neglect of these duties an error or neglect of navigation, and, as such, part of the clauses which are admitted by the merchants? What is the difference between a master who endangers the cargo by neglecting carefully to supervise the stowage, or to care for a proper dunnage, and a master who endangers the cargo by not making a careful use of the log, or between an officer who omits to have a cargo of grain properly ventilated, and an officer who omits to have the hatches properly secured?

The same or similar reasons apply to the losses or damage on cargo which happen in sheds or lighters before coming on board or before being landed after their discharge. The modern mode of conducting the business of steamship lines is entirely different from what was done some thirty or forty years ago. The steamers are run in a certain line, goods are engaged for this line beforehand; the owners cannot guarantee the shipping of the goods at a certain time or with a certain vessel. The goods, therefore, must frequently be stored before shipment. The owners provide storage in public sheds or in sheds of their own. Likewise the cargo cannot be taken in or discharged in the same way as it was formerly. It must be brought alongside the vessel by lighters, or discharged into lighters. Or the prompt expedition of steamers, which benefits the whole commercial public, requires the landing of cargoes on quays before the consignees are ready to receive their goods. The goods are received by the steamship line before they come on board. Bills of lading are signed: "Received to be shipped on board." It is clear that, thus, greater risks are run by the cargo during the time between the receipt by the vessel and the delivery to the consignee than at times when the bill of lading was only signed, "Received on board," and the cargo was taken from on board alongside the vessel. But, on the other hand, considerable advantages accrue to the merchants out of such a mode of conducting business. They save expenditure by having the goods stored in sheds of the steamship companies. They receive bills of lading sooner. They have not to provide the lighter-

age for discharging the cargo. Under these circumstances, why should legislation prohibit the shipowner from saying: "Those extra risks must be borne by the merchant—they are not covered by the freight?" I cannot see that the principle of public interest is involved in this question.

The clause of transshipment, also, is justified by these reasons. And as to the non-delivery of goods at the port of destination and returning them by other vessels, it must be granted that this may happen by carelessness of the master or officers; but it may happen, also, through inadvertency of the shipper in properly marking the goods and the port of destination, and the short time of stay at intermediate ports in some degree excuses the mistakes. At any rate, no general public interest of importance is involved in this clause, as well as in the clause limiting the amount for which the owners are responsible in case of non-delivery or belated delivery, so as to justify the interference of legislation.

This, also, seems to be the case with deck loads. The merchants complain that goods are charged on deck without previous advertisement to the shipper. But, although it is true that bills of lading often contain the clause, "the vessel to be at liberty to stow goods on deck," still the merchant, who must know the form of the bills of lading, can easily avoid any risk by stipulating, on advising the shipment to the agent of the steamship company, that the goods are to be stowed below deck, or, if not, that he be informed in time to procure a proper insurance for them.

It needs no explanation that a clause which allows the owner to bring into general average damages done to the engines by the vessels going aground without an imminent peril is of no public interest whatever.

Lastly, it is said that legislation must forbid the owners to decline their liability for the neglect of all such duties as are performed by their paid employees. "Respondeat superior." But clearly this is no argument for the interference of legislation. Reasons of public policy only can justify this interference. It is said that the nature of the contract of affreightment involves the necessity of the said liability. But this is evidently erroneous because there is nothing to hinder making a contract which differs from the contracts of affreightment defined by law.

As to the alleged monopoly of steamship companies, it may be granted that merchants frequently are compelled to submit to the conditions of the bills of lading. But only, if they do not offer a higher freight. Before it can be said that the shipowners take

undue advantage of their position, it must be proved that they refuse to increase their liability in consideration of a higher freight. This proof is, as yet, not given. The offer of an alternative bill of lading, made by the French steamship companies, is strong evidence to the contrary.

The result is that, for the present, at least, there is no reason for advocating legislative action in imitation of the Harter Act. Such legislation would be welcomed, certainly, by the underwriters on cargo. But it is evident that legislation cannot be invoked to improve the business of underwriters. If the risks are greater than formerly, the premiums must be raised. And the attitude of the underwriters at the above-mentioned Paris Conference—an attitude, which, naturally, will result in a raising of insurance premiums and not in making insurance impossible—seems to me to be fully justified if the present premiums are too low. But this is not a matter of public order, and, consequently, it affords no reason for interference by legislation.

#### VI.

If I am right thus far, the question for this association remains: Ought the Harter Act and bills of lading legislation to be dropped out of the programme of the International Law Association altogether?

I think not. It is true, as Sir Walter Phillimore remarked at the Christian Conference, that the general bill of lading proposed by the association at its London Conference in 1893 has fallen stillborn. But this only proves that it is impossible to draft a bill of lading which suits all interests concerned, and is adapted to all the ever-changing requirements of maritime commerce. It is not impossible, however, that abuses may arise which show the necessity of legislation. And it is possible, also, that iniquities may occur which could be successfully met by repeated discussions in meetings like those of this association. It is highly desirable that the commercial public shall know that the conferences of this association afford an opportunity of a public discussion on any well-founded complaints on the contents of bills of lading, and that it may be induced to communicate to this association any well-founded complaints which they may have to make.

*Dr. F. Sieveking.*



## A CURIOSITY IN ECCLESIASTICAL JUDICATION.

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At the General Convention of the Episcopal Church in 1835 the report of the committee on the state of the church declared that the condition of the diocese of Kentucky was "such as to call for a special tribute of devout acknowledgment to the Giver of all spiritual grace and of every good and perfect gift." At the next General Convention in 1838 the corresponding committee reported in regard to Kentucky that "the troubles which have disturbed the tranquility of this diocese for several years past have happily subsided." Between these two dates there had occurred an ecclesiastical trial, sufficiently peculiar in other particulars, but worthy of a place among the curiosities of legal practice for the extraordinary finding of the court which heard the case and the extraordinary penalty which it imposed. The purpose of this paper is not to enter at all into the merits of the case and barely to touch upon its place in history; but only to draw from forgotten records a suggestion of difficulties surmounted and questions of casuistry solved in a way which may perhaps be called practical for the very good reason that it is not in accordance with any theory.

At that time the Episcopal Church in the United States had no general canon as to the manner of trial of a bishop. It was left to each diocese to institute the mode of trying any of its clergy, the bishop included; only it was provided that at every trial of a bishop, there should be one or more of the Episcopal order present, and that none but a bishop should pronounce sentence on any clergyman. In Kentucky, there was no other provision than that no presentment; and it seems to have been provided in some way that action should be made against the bishop except by order of the convention upon such presentment should be in accordance with the canons of Pennsylvania. The bishop of Kentucky was Dr. Benjamin Bosworth Smith, elected and consecrated in 1832 at the age of thirty-eight, who lived to be ninety years old and was for the last sixteen years of his life, by reason of seniority, presiding bishop. At the diocesan convention in 1836 there was serious trouble as to the names of those who had a right to seats, the bishop carrying on business in a body from which he had excluded some who claimed that they were legally members. This convention, enlarged by the seat-

## *A CURIOSITY IN ECCLESIASTICAL JUDICATION 41*

ing of a few additional clergymen, among whom was the Rev. Dr. Thomas Winthrop Coit, Yale 1821, then president of Transylvania University at Lexington, sat for a while with closed doors in committee of the whole. The committee brought in a report that it had rejected a resolution "that the rumors and information which it had heard and considered were sufficient ground for a presentment of the bishop." The report was re-committed to the committee of the whole with directions to bring in an affirmative report. Instead of doing this, the committee reported again that it did not find any good and sufficient ground for the presentment of the bishop; and the convention laid the report on the table, but presently by a vote of seven to six voted to concur in it.

In the following year, 1837, the convention sat for thirteen days. The bishop objected to the seating of four out of the six clerical members whose names were on the rolls, but they were admitted. The matter of a presentment of the bishop was taken up, and he himself asked that, without any previous examination, the convention would go into the business of arranging charges and specifications. This was agreed to; and a committee with Dr. Coit at the head was appointed to take the matter in hand. The charges and specifications which they reported were adopted by a vote of fifteen to four; and with the consent of the bishop, it was agreed that they be presented to Bishop McIlvaine of Ohio, Bishop Otey of Tennessee, and Bishop Kemper of Missouri and Indiana. At a later date, Bishop McCoskry of Michigan was substituted for Bishop Otey.

The indictment was indeed formidable, at least in its length. Under Charge I, "With originating and keeping up the present disturbed state of the diocese," there were forty-one specifications; under Charge II, "With mental reservation, equivocation, insincerity, duplicity, and making statements partial, contradictory, and untrue," there were forty-two, of which twelve were repetitions of those brought earlier; under Charge III, "With defaming and persecuting the clergy and official laymen of the diocese," there were eighteen, of which but four were new, and one was withdrawn; under Charge IV, "Illegal and arbitrary conduct in office, and improper use of official influence," there were eighteen, only one being new; under Charge V, "Arrogating unreasonable privileges, and making unbecoming demands on the grounds of the Episcopal office," there were twelve, all but one being new; and under Charge VI, "In conducting the monied and other business operations of the diocese in a loose and improper manner, and disregarding obligations in money matters," there were three new specifications. The

whole number of specifications was therefore 104, reduced by deduction of repetitions to 90.

The case was soon heard and the court published its verdict. It was required under the canon to declare the accused to be guilty or not guilty of each charge and specification; a requirement in some cases like that given in the books on logic that a plain answer, yes or no, be given to the question, "Have you left off beating your grandmother?" In conforming to this requirement they found it necessary to bring in what seems a new definition of "guilty" and to frame an entirely new form of verdict. A few instances may be given, worthy of examination by some new "Provincial Letters."

Charge I, Specification 4.—"He told Mrs. Smedes that he had called her son, the Rev. A. Smedes, as his assistant in Christ Church, Lexington, with a salary of \$1,000 a year, when he had not done so; in consequence of which she reserved room for him and refused a number of boarders, and suffered great disappointment and loss." Finding: "Guilty—without the least criminality."

Specification 5: "The bishop having told several persons that he had called the Rev. A. J. Smedes to be his assistant, one of the wardens went to inquire about it, and the bishop told him he had done no such thing." Finding: "Guilty—without the least criminality."

This finding of "Guilty without criminality" occurs about twenty times and that of "Guilty" with other modifications over fifty times. But to proceed:

Specification 17 of Charge I is to the effect that the bishop had told some of the clergy "that if they differed from him in opinion, it was very indelicate to continue in office;" as to which it was decided that he was "Not guilty—but unwise."

In Specification 29, it was charged that he had declared of certain persons "that they were schismatics, and deserved no aid and would receive none with his consent—or words to that amount;" and the finding takes this form: "Guilty in this—the facts alleged are true, but of no importance."

The decision on Specification 13 of Charge II shows a sympathy with a hard-pressed conscience: "When a fair was spoken of in Lexington, the bishop, in conversation with John E. Cooke on the subject, agreed that they were abominable evils and destructive of the influence of religion over the minds of all, and especially of the young; while on the other hand, he spoke favorably of them to the ladies who were anxious to have one, and advised them to go on." "Guilty of inconsistency, reconcilable however with honesty."

The next specification is too long to quote, but the conclusion is

edifying: "Guilty in this: That the facts alleged are true, and the court cannot reconcile them with propriety or justice." On Specification 15 of Charge III, we have the conclusion that the bishop was "Guilty of an authorized insinuation against Dr. Cooke."

On Charge IV, Specification 1: "In declaring to a trustee, that let the trustees of the seminary make what laws they might, the seminary must go on, and should go on," it was decided that the accused was "Guilty without criminality—Specification of no importance."

Under the head of Charge V, Specification 1 having been dismissed with the words: "Not guilty, but unwise," the second reads thus: "The bishop complained of it as an outrageous and atrocious insult, that the standing committee shall think of advising him to resign, although a majority of that body believed he ought to resign;" and the finding is: "Guilty of the complaint as charged, but the court cannot impute blame." The third is rather more remarkable: "By saying that for a standing committee to advise a bishop to resign was as preposterous as for a cabinet to advise a king to abdicate;" "Guilty of the words charged, without blame."

Finally, in the last specification the bishop was charged with "using \$789 of the money collected for the seminary in New York for his private purposes . . . and declaring that he . . . should never think it wrong to use any money in his hands, belonging to the church, for his necessary expenses;" and the court found that he was "Guilty in this: That the facts alleged are true, but the accused under the circumstances free from blame."

The plain verdict of "Guilty" was rendered on five specifications, and that of "Not guilty" on twenty-three; the others were diversely qualified. In the summing up of each charge the accused was acquitted of guilt; but the three bishops who heard the case did find that he had "mistaken views of duty and expediency;" that he had "sometimes used language in a manner so careless and indiscreet as naturally to expose him to a suspicion of insincerity;" that he had taken and used "a belligerent attitude and deportment which, though honestly believed by him to be warranted and necessary, was uncalled for;" that "in some cases his acts, though believed by him to be right, were not sufficiently conciliatory."

Therefore, though declaring the accused not guilty of the charges preferred, the court evidently thought that he deserved some discipline, and then proceeded to affirm that it would not be necessary to execute it. Having first declared that the peculiar circumstances were such as "to call for, from both parties towards each other, and from the community in general, much kind, charitable,

and extenuating consideration," and that they hoped that "for the peace of the church and the spiritual good of all concerned, the parties to this issue and their friends respectively would scrupulously avoid whatever may tend in any way to renew the controversy," they gave their final decision in these words:

"In conclusion, the court considers that in the publication of so much of their sentence as contains an opinion of guilt and expression of the censure of the court, the accused has received the merited admonition and penalty, and are now therefore prepared to reinvest him with his robes of office, and receive the Right Rev. Benjamin B. Smith, as bishop of the Diocese of Kentucky, within the rails of the altar and reinstate him in their affectionate confidence."

So ended this extraordinary trial. It would not have been brought forth from the obscurity of almost unknown—and when not unknown, ignored—records, had it not been considered that after all these years it would be looked upon only as a curiosity, perhaps unique in the way alike of charge, of finding, and of sentence. To some it may suggest a study in psychology or in ethics; the present writer is not prepared to enter upon the one or the other.

*Rev. Samuel Hart, D.D., D.C.L.*

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## POLICE POWER; SCHOOLS FOR WHITE AND COLORED PERSONS.

Following the Civil war it was generally thought that the solving of the negro question lay in the association of the colored people with the whites. A decade, however, has wrought a change in this view; public opinion, especially in the southern states, has discarded the association idea and the separation of the races is now considered the proper solution of this vexed problem. Whether this swinging of the pendulum indicates an advancement or a retrogression remains to be seen. That the advocates of separation, of segregation, almost, are sincere is unquestioned, but sincerity in advocating a cause has never been any guarantee of its wisdom. True it is, every patriot is sincere; so too is every demagogue.

This theory of separation has been carried to great lengths in Kentucky. An act was passed by the legislation of that state in 1904 which made it unlawful "for any person, corporation or association of persons to maintain or operate any college school, or institution, where persons of the white and negro races are both received as pupils for instruction." For violation of this act a fine of \$1,000 was imposed. This statute has recently been sustained by the Court of Appeals of Kentucky, in *Berea College v. Commonwealth*, 94 S. W. 623. Such an act was the valid exercise of the police power of

the state, it was said, and not in violation of the fourteenth amendment of the constitution of the United States.

Reduced to a single, simple proposition the court decided that "it was a fair exercise of the police power to restrain the two races from voluntarily associating together in a private school to acquire a scholastic education." Hitherto the police power of the states has only been directed to three phases of the relations between colored and white persons, viz.: (1) Intermarriage; (2) Public Conveyances; (3) Public Schools. The grounds upon which the state bases its right to prohibit intermarriage are obvious; the identity and characteristics of each race could be preserved in no other way. *Ex parte Hobbs*, 1 Woods (U. S.) 537 Gen. O. Cas. No. 6-550. Statutes separating the races in public conveyances and public schools are defended and sustained by the courts because in both instances colored and white persons are forced to associate with one another. Necessity brings them in contact on railroads; compulsory attendance statutes, in public schools. To avoid racial clashes arising from such enforced association, the courts have repeatedly upheld regulations for separate railroad cars and separate public schools; *Westchester & Phil. R. R. Co. v. Miles*, 55 Pa. 209; *Asco. v. School Board*, 161 N. Y. 598.

The present case however is beyond the reasoning of the above decisions. If white and colored persons desire to receive instruction at the same private institution, and teachers are willing to instruct both races, upon what ground can the state prevent this association? Upon what ground should instructors be fined for voluntarily teaching white and colored pupils who voluntarily come together for instruction? Is the legitimate tendency of such voluntary association to "destroy the identity and purity of the races?" Does such intermingling logically result in "clashes between the races?" And yet it is upon these two reasons that the court bases its entire decision.

If a state has the power to fine an instructor for teaching negroes and white persons together, it is respectfully submitted that it also has the power to fine any lecturer who addresses an audience composed of both races, whether that lecturer be connected with a college or hire a hall to address any who may choose to hear. If it is made a misdemeanor to teach white and colored persons together, he who throws open his store to both races equally, should be punished; an innkeeper should be penalized for holding out accommodations to all—wherein lies the distinction?

As a result of the enforcement of this statute an institution,

which for fifty years has held its doors open to all, whose purpose in teaching, as expressed in its charter, was "for promoting the cause of Christ," now stands guilty under an indictment. The Court of Appeals of Kentucky considered this separation statute as only a fair exercise of the police power by the legislature.

Whether its decision would have been the same had the police power been exercised in reference to any subject except the relation between the colored and white races, is an entirely different question. This power of police is an expansive power and circumstances often alter cases.

#### THE RIGHTS OF A PASSENGER PRESENTING A WRONG TRANSFER.

This question has usually arisen when the conductor has attempted to eject the passenger presenting such defective transfer, and the late case of *Norton v. Consolidated R. Co.*, 79 Conn. 109, is no exception. There the plaintiff boarded a car, paid his fare, and asked for a transfer. Through the negligence of the conductor this transfer was wrongly punched and the conductor of the second car attempted to eject him, but finally desisted. The action was brought for damages for the alleged assault.

The particular point involved turns on the question of the conclusiveness of the transfer. In deciding whether or not the transfer is conclusive on the passenger, the various courts of appeal, before whom the problem has arisen, have reached exactly opposite conclusions.

In the case of *Indianapolis St. R. Co. v. Wilson*, 66 N. E. 950, recently decided, the court adopts the view that the ticket is not conclusive evidence of the contract of passage. Jordan, J., says: "The ticket is only evidence of the contract, and if it fails to disclose the true contract its infirmity or fault in this respect must be chargeable to the carrier, and the latter is liable for the natural consequences. . . . Inasmuch as the passenger is not permitted to have anything to do with the preparation of the ticket, the passenger has a right to presume that the ticket furnished him is a correct expression of the contract between himself and the carrier." The plaintiff, therefore, was given damages for the assault. The court cited, in support of this view, *Trice v. Chesapeake, etc., R. R. Co.*, 40 W. Va. 271; *Ellsworth v. Chicago R. Co.*, 95 Iowa 98.

The opposite result, however, was reached in *Bradshaw v. R. R. Co.*, 135 Mass. 407, where the court said the rule of the company requiring the passenger to have a proper ticket was a reasonable one, and the right of the passenger to transportation is no greater than



the right of the railroad company to make reasonable rules. Such a rule, the court says would be more practical and probably result in less fraud and corrupt use of transfers. *Frederick v. R. R. Co.*, 37 Mich. 342.

The case under discussion in Connecticut arrived at the same conclusion as the above holding. The court affirmed that the duty of deciding the passenger's right to ride over the second car devolved upon the conductor of that car and the only evidence of the right was the transfer. The passenger should have paid his fare and sued for the defendant's breach of promise to carry him. The conductor was not considered under an obligation to accept the passenger's statement that the mistake in the transfer was due to the fault of the first conductor. His right to ride for the time being was conclusively evidenced by the terms of the ticket. *Mosher v. St. Louis I. M. & S. Ry. Co.*, 127 U. S. 390.

That the ticket should be conclusive evidence of the passenger's right to travel would seem to be the more practical rule. Any other view makes possible fraudulent statements in regard to the ticket. If the conductor is compelled to take the word of the passenger, what is to hinder the passenger's using a ticket two months old and saying that it had been punched wrongly? An electric road will certainly not make a practice of issuing wrong transfers where an action for damages for breach of contract will always lie; but if the opposite conclusion is adopted, a road is compelled to allow passengers to ride on their own statements of the transactions, and the only remedy open to the company is to bring suits against innumerable unknown persons to decide whether or not an extra fare is owed.

A carrier can always be reached by process if any mistake has been made, but it would impose a great hardship on any corporation to compel it to identify and serve a summons on every passenger who has ridden on a disputed transfer. Considered, therefore, from this point of view, a conclusive transfer is the fairer solution of the problem.

#### COAL MINES; THE LAW OF SUBJACENT SUPPORT.

In the case of *Griffin v. The Fairmont Coal Co.*, 53 S. E. 24 (W. Va.), the Supreme Court of Appeals of West Virginia recently handed down a decision which apparently disapproves and repudiates the vital principles of lateral and subjacent support as they have been previously declared by every American court in the interpretation of those contracts which pass title to coal underlying the surface of land. In this case the court decided (*Poffenberger, J., dis-*

sending) that where a deed conveys the coal under a tract of land together with the right to enter upon and under said land and to mine, excavate and remove *all* of said coal, there is no implied reservation in such an instrument that the grantee must leave enough coal to support the surface.

The early English cases held, without exception, that the surface owner had a right to demand sufficient support for the surface, even if to that end it was necessary to leave every pound of coal untouched under the land. *Humphries v. Brogden*, 1 Eng. Law & Eq. 250; *Earl of Glasgow v. The Alum Co.*, 8 Eng. Law & Eq. Rep. 13. In the pioneer case of *Harris v. Ryding*, 5 M. & W. 59, Baron Parke said: "I do not mean to say that all the coal does not belong to the defendants, but that they cannot get it without leaving sufficient support for the surface in its natural state." Practically all of the cases base their opinion on one of two grounds, *i. e.*, either on an implied reservation of sufficient support, or on the maxim: "*sic utere tuo ut alienum non laedas*." In the case of *Smith v. Dabry*, 42 Law Journal Rep. N. S. Q. B. 140, it was said that there was a presumption in favor of the grantor. That is, the courts adopted the curious mode of assuming, in the first instance, the existence of an intention that the right of support should not be disturbed, and then proceeded to consider whether the provision used could not be reconciled with that intention.

Owing to the extensive experience of the English courts in applying the principles of mining law, the American courts naturally followed implicitly in their footsteps. The right of support was said to be, not in the nature of an easement, but *ex jure naturae*. Hence it could not come within the class of those ambiguities which were to be construed most favorably to the grantee, *Horner v. Wilson*, (Pa.) 21 Am. Rep. 61. Where one person makes a grant of land to another, reserving the minerals in the land, a covenant will be implied, in the absence of all words to that effect, and solely from the nature of the transaction, that the grantor, in removing the minerals reserved, should leave or provide sufficient support for the surface, *Lord v. Carbon Iron Manufacturing Co.*, 42 N. J., Eq. 158. This right of support may not be taken away by mere implication from language not necessarily importing such a result. *The Law of Mines and Minerals in the United States*, by Barringer and Adams, 676. To substantially the same effect are *Livingstone v. Moingona Coal Co.*, 49 Iowa 369; *Jones v. Wagner*, (Pa.) 5 Am. Rep. 385; *Coleman v. Chadwick*, 80 Pa. 81; *Nelson v. Hoch*, 14 Phil. 65.

In the case under discussion the whole decision hangs on the construction of the word *all*. The majority in their opinion contend that since there is a grant to remove *all* the coal, there is an implied grant to take away the support of the surface, because the destruction of the surface is the natural and inevitable result of such removal from under the surface; contracts of this nature, it is said, should be construed according to their natural and literal meaning without any preconceived assumption of an intention that the right of support should not be disturbed.

This view seems to us to be founded on sound reason although opposed to what has hitherto been a settled rule of law. If the surface owner has agreed to the act, anticipated the injury and received compensation therefor it is not just that, by invoking the aid of an implied assumption in his favor, or the principle of *sic utere tuo ut alienum non laedas*, he should be able to recover a second compensation. His injury is rather *damnum absque injuria*.

THE RIGHT OF A STATE TO CANCEL THE LICENSE OF A FOREIGN CORPORATION, FOR REMOVING SUITS TO A FEDERAL COURT.

It is a well accepted principle that a state may allow a foreign corporation to transact business within its limits subject to any restriction not repugnant to the Federal Constitution.

Whether a state has the right to provide that if a foreign insurance company shall remove a case to the Federal Court which has been commenced in a state court, the license of such company shall be thereupon revoked, was decided affirmatively on May 14th, 1906, by the U. S. Supreme Court, Justices Harlan and Day *dissenting*.

Two cases, *The Security Ins. Co.* and *Traveler's Ins. Co. v. Henry E. Prewitt*, insurance commissioner of Kentucky, were tried together on appeal from the Kentucky Court of Appeals. The former was brought in a lower court to avoid the effect of a revocation of a permit to do business in the state of Kentucky and the latter to enjoin the cancellation of the permit.

In 1874 in the case of *Home Ins. Co. v. Morse*, 87 U. S. 445, it was decided that a statute of the state of Wisconsin requiring a foreign insurance company to agree not to remove any suit for trial into the United States Circuit Courts or Federal Courts was unconstitutional and the agreement void as ousting the jurisdiction given them by the Federal Constitution and statutes of the United States. The point on which this decision turned was that the agreement was exacted as a *condition precedent* to the granting of the license by the state. In a later case, *Doyle v. Continental Ins. Co.*, 94 U. S. 535,

the same view was taken, but as another portion of the same statute was under consideration it was held that the state had the right to revoke the license *after* the company had made the transfer of the suit to the Federal Courts. The distinction to be noted here is between the *condition precedent* held to be unconstitutional and void in the first case and the *right of revocation* which was sustained in the latter case.

*Barron v. Burnside*, 121 U. S. 186, held an Iowa statute unconstitutional as to a section providing for an agreement not to remove a suit to the Federal Court. Under the particular section an officer of the corporation was arrested for not complying with the statute and, though the highest court of Iowa refused to release him under a writ of *habeas corpus*, its decision was reversed by the U. S. Supreme Court. It is worthy of notice, in this connection, that in the Doyle case the statute, as a whole, was upheld, though certain sections of it were decided to be unconstitutional; while in the Barron case the whole statute was rejected through the invalidity of a material part which was a sub-division of one of the sections. The cases cited, in line with the present decision, all hold that a state may not exact an agreement from a foreign corporation not to remove cases to the Federal Court as a condition precedent to transacting business within the state.

A review of the cases and text-books would indicate that even without such a statute the state can expel the foreign corporations and the motive therefore is not to be inquired into. The Kentucky statute is defended on the ground that it only seeks to place foreign corporations on a level with those of the state of Kentucky. Considering the constitutional questions involved, this statement is rather misleading and no attempt is made to explain it either in the case considered or in any of those coming up from the Kentucky courts.

Justices Day and Harlan dissent emphatically from the majority opinion. By a strained construction of previous decisions it is made to appear that such power of revocation does not exist in the state. It is strongly stated that "under the guise of exercising a privilege belonging to the state every foreign corporation might be deprived of the opportunity of doing business within the borders of another state, except on condition that it strip itself of every protection given it by the Federal Constitution." But the state is not exercising a "privilege" in this matter but an admitted right. If such a thing can be imagined it may indeed bring about such a condition of things as existed in the days before the adoption of the Articles of Federation when commerce between the colonies was carried on under great

difficulties. All discussion of corporations engaged in inter-state commerce has been carefully avoided in all of the decisions.

To maintain that a state cannot say to a corporation: "You may do business here if you won't remove cases to the Federal Courts" and then allow the state to revoke or cancel the license of the corporation for this very thing and without any stipulation previously made seems more like an evasion of the question than a distinction.

The foundation of this last decision, and the only ground upon which it can be sustained, seems to be the right inherent in the state to expel any foreign corporation with or without reason.

#### POLITICAL CAMPAIGN CONTRIBUTIONS BY INSURANCE COMPANIES.

A question which has been of considerable public interest since the recent insurance investigation in New York arises as to the nature of an insurance company's act in making a contribution to a national campaign fund of a political party. Such act is of course *ultra vires*, but is it illegal in the absence of statutory prohibition?

In a case where the vice-president of an insurance company was sought to be convicted of larceny for participating in such an act, a decision was rendered on *habeas corpus* proceedings which held such a contribution by an insurance company illegal inasmuch as it was against public policy. *People ex rel. Perkins v. Moss, et al.*, 100 N. Y. Supp. 427. The court says: "To permit an artificial creature of the state, unless it be a corporation expressly permitted by law to engage in political matters, by the unauthorized use of its corporate funds to become an active force in a political contest, would be to sanction an infringement upon the rights of the voters who alone . . . may elect, directly or indirectly, officials in advocacy of the principles for which they contend. To encourage the unauthorized use of corporate funds to political purposes might result in the creatures of the state becoming its masters. . . . An unauthorized act of a corporation that affects public interests with such serious and far-reaching consequences is a menace to the state and contrary to public policy."

An opposite conclusion, however, was reached on appeal to the Appellate Division, *People v. Moss*, 99 N. Y. Supp. 138, it there being said that such act is neither *malum prohibitum* nor *malum in se*; nor even wrong ethically to the extent of implying criminality inasmuch as "the object could not have been to influence legislation favorable to the interests of the company or to prevent unfriendly legislation, because Congress has no jurisdiction over insurance corporations organized under state laws."

This later opinion in regard to this particular point is by no means satisfactory. It is undoubtedly true as is said in *Thompson on Corporations* (Volume VII, sec. 8314) that the theory that every act of a corporation in excess of its granted powers is an act in contravention of public policy, is now happily disappearing from American jurisprudence. Nevertheless there are many *ultra vires* acts of corporations which by reason of their mischievous nature or tendency are contrary to the peace and order of society and hence illegal. The argument that a contribution to a national campaign fund does not fall within that class because Congress has no jurisdiction of state insurance corporations is by no means convincing. As a conclusive answer to the grounds upon which the lower court bases its reasoning, the opinion of the Appellate Division leaves much to be desired.

## RECENT CASES.

**CARRIERS—INJURIES TO PASSENGERS—DEPOT PLATFORMS.—PITTSBURG, C., C. & ST. L. RY. CO. v. HARRIS, 77 N. E. 1051 (IND.).**—In an action for injuries to a passenger by falling on an icy depot platform, instructions requiring the carrier to exercise the highest degree of care consistent with the operation of its railroad in providing reasonably safe means for passengers to enter and depart from its cars and depot, and declaring that a carrier of passengers is held to the highest degree of care in taking aboard and discharging passengers, and is liable for the slightest neglect, etc., *held*, were erroneous, as imposing too high a degree of care.

Common carriers of passengers are required to do all that human sagacity and foresight can do under the circumstances, in view of the character and mode of conveyance adopted, to prevent accidents to passengers and are responsible for any—even the slightest—negligence, *Diabola v. Manhattan Ry. Co.*, 8 N. Y. Supp. 334; *Baltimore & O. R. Co. v. Wightman*, 26 Am. Rep. 384. The above cases would seem to impose a higher degree of care than the one digested. However *Chicago & N. W. Ry. Co. v. Scates*, 90 Ill. 586 holds that a railroad company is bound to do no more than to provide a suitable platform, approaches, etc., at its depots and stations, and use ordinary care. There are always arising a multitude of cases on the subject but the prevailing view seems to be in harmony with this case. It is more logical and consistent with sound reasoning. To require a railroad company to exercise this highest degree of care in keeping their station platforms and approaches for the use of passengers in boarding and alighting from trains would be manifest injustice, *Louisville & N. R. Co. v. Cockerel*, 33 S. W. 407.

**CARRIERS—STREET RAILROADS—MISTAKE IN TRANSFER.—GEORGIA RY. & ELECTRIC CO. v. BAKER, 54 S. 639 (GA.).**—*Held*, that the conductor of the second car must at his peril determine the right of the passengers to ride upon the transfer, notwithstanding it does not upon its face show such right.

The franchise of the street railway company may, or may not, require the company to issue transfers to its passengers, but in both cases their effect is the same. *Indiana R. Co. v. Hoffman*, 161 Ind. 573. The object of the transfer being to secure an additional passage, upon its face it must clearly indicate what that passage shall be. *Tawshe v. Tacoma R., etc., Co.*, 70 Pac. 118 (Wash.).

Against this view and, it seems, with the better reason, it is maintained that the transfer is conclusive as to the right of the passenger to ride upon the second car. *Frederick v. Marquette, etc., R. Co.*, 37 Mich. 342; *Norton v. Consolidated Ry. Co.*, 79 Conn. 109; *Baldwin's Am. R. R. Law*, p. 292. Clearly there is a conflict of rights. *Townsend v. New York, etc., R. Co.*, 56 N. Y. 295. The passenger has a sufficient remedy upon breach of contract. *Mosher v. St. Louis, etc., R. Co.*, 127 U. S. 390. To confine him to this relief would only enforce the rights of the company; *Bradshaw v. South Boston R. Co.*, 135 Mass. 407; and respect the element of public interest involved. *Pennsylvania R. Co. v. Connell*, 112 Ill. 295. See Comment *ante*

**CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—***STATE V. LILLISTON*, 54 So. E. 427 (N. C.).—*Held*, that in a criminal case, a motion for a new trial would not be granted by the Supreme Court, to enable the defendant to produce evidence which he had in possession at the time of the trial but withheld from the jury. *Connor and Walker, JJ., dissenting.*

In the great majority of our states the doctrine is well established, that in the absence of any constitutional or statutory provision to the contrary it is the exclusive province of the court to determine all questions of law that arise in criminal prosecutions. *Sparf v. U. S.*, 156 U. S. 51; *State v. Elwood*, 73 N. C. 189. As a general rule a new trial will be granted, if since the former trial new evidence has been found which would in all probability have changed the result of the trial. *Simmons v. Mann*, 72 N. Car. 12; *Husted v. Mead*, 58 Ct. 55. But facts which are within the knowledge of the defendant at the trial and are not put in evidence as in this case, do not constitute new evidence and are not grounds for a new trial. *Heard Civil Pleading*, p. 82; *Tilley v. State*, 55 Ga. 557; *People v. Cesena*, 90 Cal. 381. In criminal actions the Supreme Court of any state, in the absence of any constitutional or statutory provision to the contrary, is limited to a review and correction of errors of law committed in the trial below. *Carson v. Dellinger*, 90 N. C. 226; *Sumrison v. Mann*, 92 N. C. 12.

**EVIDENCE—OFFER OF COMPROMISE.—***FINN V. NEW ENGLAND TELEPHONE & TELEGRAPH COMPANY*, 64 ATLANTIC 490 (MAINE).—*Held*, that the admissibility or non-admissibility of evidence offered to prove an alleged compromise depends upon the intention of the party seeking it. If he intends his offer to be a compromise settlement it is inadmissible. If he intends it to be an admission of liability, coupled with an endeavor to settle such liability, then it is admissible to prove such liability.

The general rule seems to be that a written offer to compromise, it being on its face an offer to compromise the case, is not admissible. *Tufts v. DeBignon*, 61 Ga. 322. Admissions of a party, when made for the purpose of effecting a compromise of the matter in dispute, should be excluded as evidence, on the ground of public policy. *Rockefeller v. Newcomb*, 57 Ill. 186. But it is held that no part of an offer to compromise is admissible if it is expressly stated to be made without prejudice. *White v. Old Dominion Steamship Co.*, 102 N. Y. 660; *Tennant v. Dudley*, 144 N. Y. 504. Some courts have held that while an offer of compromise, as such, is inadmissible, statements of independent facts are admissible against the party making them. *Chaffe et al v. Mackenzie*, 43 La. Ann. 1062; *Rose v. Rose*, 112 Cal. 341; *Garner et al v. Myrick et al*, 30 Miss. 448. It is held in some jurisdictions that an offer of compromise is not admissible, either as evidence of a fact from which the liability of the party making the offer may be inferred, or as an admission of such liability. *Sherber v. Piser & Yennay*, 26 O St. 476. Statements not admissible for any purpose if made in offer of compromise. *Robertson v. Blair*, 56 S. C. 96; *Johnson v. Wilson*, 1 Pinn. 65, (Wisc.).

**EVIDENCE—RES GESTÆ—INJURIES TO SERVANT.—***SO. IND. R. R. CO. V. OSBORNE*, 78 N. E. 248 (IND.).—*Held* that in an action for injuries the defendant was not harmed by the admission of the declaration against interest made by its agent, an engineer, forty-five minutes after the accident. *Wiley J., dissenting.*



It is a well-established rule of law in the United States that when a declaration against interest is made by an agent which is unquestionably subsequent both as to time and casual relation, such declaration is inadmissible. *Williams v. Cambridge R. R. Co.*, 144 Mass., 148; *Packet Co. v. Clough*, 20 Wall. (U. S.) 528. But if the declaration is subsequent in time, while in point of casual relation to the main act substantially contemporaneous, as occurs in this case, it will be admitted in some states and rejected in others. The weight of modern authority, however, favors the relaxation of this rule, when the declaration by the agent is undesigned and spontaneous. *Huffcut on Agency*, Ed. 2, p. 184; *Olive, etc., R. R. Co. v. Stein*, 133 Ind. 243; *Hermes v. Chicago, etc., R. R. Co.*, 80 Wis. 590. Yet this case does not necessarily favor this rule, since its admission is harmless, inasmuch as facts sought to be shown have been, otherwise, fully and properly established. *Webb v. Barling*, 81 U. S. 406; *Gray v. Borrough of Danbury*, 54 Conn. 574. It seems, however, in the southern and eastern states, and in the U. S. Supreme Court, such declarations made by railroad conductors, engineers, etc., as to the accident are generally excluded. *Southerland v. Wilmington, etc., R. R. Co.*, 106 N. C. 100; *Furst v. 2nd Ave. R. R. Co.*, 72 N. Y. 106; *Vicksburg, etc., R. R. Co. v. O'Brien*, 119 U. S. 99.

HOMICIDE—SELF-DEFENSE—DUTY TO RETREAT.—*HILL v. STATE*, 41 So. 621 (ALA.).—*Held*, that the plaintiff should have retreated if thereby he could have avoided the necessity of taking the life of the decedent.

Upon this question the authorities are by no means uniform. This case follows the common law doctrine and the English rule as expressed by Blackstone, Volume IV, p. 185; and as declared by several states, that homicide is justifiable only when every means of escape has been exhausted. *State v. Walker*, 9 Honst. 464 (Del.); *Compton v. State*, 110 Ala. 24. Other states, and it seems with the greater weight of authority, hold that the party whose person is unlawfully attacked is not bound to retreat in order to avoid the necessity of killing his assailant. *State v. Bartlett*, 178 Mo. 658; *State v. Sherman*, 16 R. I. 631; *Beard v. N. S.*, 158 N. S. 550. The reason for the more lenient construction now placed upon the strict requirement of the common law may be attributed to the introduction of fire arms and the recognition by courts that self-defense should not be distorted into self-destruction by the unreasonable requirements of the duty to retreat. *Duncan v. State*, 49 Ark. 543.

INFANTS—CONTRACTS—FALSE REPRESENTATIONS AS TO AGE—EFFECT.—*COMMANDER v. BRAZIL*, 41 SOUTHERN 497 (MISS.).—*Held*, an infant who, after reaching the stage of maturity indicating that he is of full age, enters into a contract falsely representing himself to be of age and accepts the benefits thereof, is estopped from denying that he is not of age when the contract is sought to be enforced against him; the party dealing with him believing him of full age.

The question here involved has long been a much mooted question in the various jurisdictions of this country. And although the courts have by no means been harmonious in their conclusions the weight of authority on this point is well defined. At law, the fraud of an infant in falsely representing himself to be of age and so inducing another to contract with him, does not estop him from pleading his infancy if sued upon the con-

tract. *Studwell v. Shapter*, 54 N. Y. 249; *Sims v. Everhardt*, 102 U. S. 300. Contra by statute, *Dillon v. Burnham*, 43 Kan. 77. By so doing, however, the infant will in many jurisdictions incur a liability for deceit. *Fitts v. Hall*, 9 N. H. 441; *Wallace v. Marss*, 5 Hill (N. Y.) 391. Contra *Nash v. Jewitt*, 61 Vt. 507; *Slayton v. Barry*, 175 Mass. 513. In equity, however, where the infant has falsely represented his age, or taken active steps to conceal it and has thereby induced the other party to enter into the contract, his fraud will estop him from pleading his infancy to the prejudice of the other. *Ferguson v. Bobo*, 54 Miss. 121; *Charles v. Hastedt*, 51 N. J. E. 171. But mere failure to make known his age is not such a fraud as will justify equitable interference with the common law rule. *Baker v. Stone*, 136 Mass. 405; *Davidson v. Young*, 38 Ill. 145. If goods are obtained by an infant by fraudulent representation as to his age, it is the better opinion that the other party may rescind the contract and recover the goods. *Badger v. Phinney*, 15 Mass. 359; *Neff v. Landis*, 110 Pa. 204.

**MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK.—**CENTRAL GRANARIES CO. v. AULT, 106 N. W. 418 (NEB.).—*Held*, that a servant, who from the length or character of previous service or experience, may be presumed to know the ordinary hazards attending the proper conduct of a certain business, is not entitled, as an absolute right, to the same or similar notice of dangers incident to the employment, as if he was ignorant or inexperienced in the particular work.

The facts in this case appear to preclude a negative influence from those losses establishing the master's liability when he has failed to give proper warning and notice when he knew of latent defects, *Nason v. West*, 78 Me. 253; or has furnished not reasonably safe machinery, *Matthew v. Rilston*, 156 W. S. 391; or when the master employs persons too young and inexperienced to appreciate the dangers attending the work, *Hays v. Colchester Mills*, 69 Ver. 1; or when the servant, knowing of the defects and dangers, has continued at work without objection. *Woodley v. Metropolitan R. R. Co.*, 12 R. 2 Ex. D. 384. It is generally conceded in all jurisdictions that a servant assumes the ordinary risks incidental to the work. *Cooley on Torts*, Sect. 552; *Hayden v. Smithville Manf. Co.*, 29 Conn. 548. The master can not send the servant into new and dangerous work without instructions, but if the dangers are obvious and familiar, a servant can not demand instruction as to it, *Bergen v. St. Paul Ry. Co.*, 38 N. W. 814 (Minn.); or if the dangers incidental are patent to every one or could have been seen by the servant, had he used reasonable care, then the master is not liable. *Welsh v. Bath Iron Works*, 98 Me. 361.

**NUISANCE—ACTION FOR DAMAGES—NEGLIGENCE.—**STOKES v. PENNSYLVANIA R. CO., 63 ATL. 1028 (PENN.).—*Held*, that in an action for damages occasioned by the maintenance of a nuisance, the question of negligence is not involved.

This case is strictly in line with the rules laid down in most jurisdictions. *Gas Co. v. Murphy*, 39 Pa. St. 257. As long as nuisance is not committed a person may, if he exercises due care, use his property as he sees fit. But when damage is a necessary consequence the question of negligence does not apply but the law of nuisance does. *Bohan v. Port Jervis Gas Light Co.*, 25 N. E. 246 (N. Y.). The exception to this rule is in the case of authorized

public works. In this case negligence must be alleged in order to make out a nuisance. *Transport Co. v. Chicago*, 99 U. S. 635.

RAILROADS—ACCIDENT AT CROSSING—SIGNALS—QUESTION FOR JURY.—GOODWIN ET UX. v. CENTRAL R. R. OF NEW JERSEY, 64 ATL. REP. 134.—Where a train ran into the hind wheel of a wagon passing over a railroad crossing, *held*, that in view of the positive testimony of the plaintiff that the statutory signals were not given, corroborated by circumstantial testimony, that question should have been submitted to the jury, notwithstanding the positive testimony of the defendant's witnesses to the contrary. Gummer, C. J., and Reed, Green, Gray and Dill, JJ., *dissenting*.

Where several witnesses testify that an engine bell was ringing as the train approached the crossing, and one witness who was in a position to hear, testifies that he did not hear the bell rung, the question whether the bell was rung must be submitted to the jury. *Atchison, T. & S. F. R. Co. v. Feehan*, 149 Ill. 202. So, where persons near the track did not hear any signals and certain members of the train crew testified that the bell was rung, it was decided that it was a question of fact for the jury. *Reed v. Chicago, St. P. and M. & O. Ry. Co.*, 74 Iowa 188; *McDuffie v. Lake Shore and M. S. Ry. Co.*, 98 Mich. 356. For, the position and situation of the witnesses, the attention they were giving, and their credibility, are questions for the jury, and hence it is proper to submit to them the ultimate fact as to whether or not the bell was ringing. *Murray v. Missouri Pac. Ry. Co.*, 101 Mo. 236. And, in such a case, where conflicting testimony is given on both sides, the determination of the question is for the jury. *Ernst v. Hudson River R. Co.*, 24 Howard Practice 97; 32 Howard Practice, 262.

RAILROAD—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.—LEGANO v. NEW YORK CENT. AND H. R. R. Co.—99 N. Y. SUPP. 1103. Where, in an action for injuries to a girl five years and ten months old, who was struck by a locomotive at a crossing, it did not appear from any of the plaintiff's evidence that she looked in the direction from whence the locomotive approached, or that she exercised any care, *held* that there should have been a non-suit. Spring & Kruse, JJ., *dissenting*.

A child must exercise such care and diligence at a railway crossing as would reasonably be expected from its age and intelligence at the time. *Baltimore & O. Ry. Co. v. Breinig*, 25 Md. 378. Nor could the child recover if it failed in this, even though the jury should find negligence on the part of the defendant. *Baltimore & O. Ry. Co. v. Breinig*, *supra*. It has been held that a child seven years of age, could not be deemed, as a matter of law, to be *sui juris* so as to be chargeable with negligence, but that it presented a question for the jury. *Stone v. Dry Dock Ry. Co.*, 115 N. Y. 104. A child four or five years is not, as a matter of law, chargeable with contributory negligence, and barred from recovery in action brought by him, because he did not exercise reasonable care to avoid injury. *Westbrook v. Mobile & Ohio Ry. Co.*, 66 Miss. 560. The child's capacity is always the measure of his responsibility and if he has not the ability to foresee and avoid danger, negligence will never be imputed to him. *Philadelphia Ry. Co. v. Loyer*, 112 Pa. St. 414.

STREET RAILROADS—INJURIES TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE—DEFECTIVE HEARING.—ADAMS v. BOSTON & N. ST. RY. Co.—78 N. E. 117

(Mass.).—Where deceased, at the time he was killed while walking on defendant's street car track, was 78 years of age and very deaf, *held*, his want of hearing made it incumbent on him to be more alert in the use of his other senses.

It is not, as a matter of law, negligence for a man 79 years old, blind in one eye and of defective hearing, to drive unattended on a public street. *Robbins v. Springfield Street Ry. Co.*, 165 Mass. 30. Nor is it necessarily negligence for a blind person to be unattended on the street. *Smith v. Wildes*, 143 Mass. 556. The test in such cases is: Under the special circumstances what care is reasonably necessary to insure safety? *Neff v. Wellesley*, 2 L. R. A. 500. An infirm person must use such care as one with such infirmity and conscious of it should use. *Cleveland C. & C. R. Co. v. Terry*, 8 O. St. 570. The extent of care is greater for a person suffering from an infirmity to avoid danger. *Mark's Adm'r v. R. R. Co.*, 88 Va. 1.

TELEGRAPHS—DELAY IN DELIVERY OF MESSAGE—DAMAGES FOR MENTAL SUFFERING.—*GEROCH v. WESTERN UNION TELEGRAPH CO.*, 54 S. E. 782 (N. C.).—*Held*, that where, by reason of defendant's delay in delivery of a telegram announcing plaintiff's illness to her husband, the addressee was detained for nearly two days in reaching her bedside and the plaintiff testified that the delay caused her great anxiety, mental suffering, and a nervous chill, whether damages were recoverable for the defendant's negligence in addition to the price of the telegram was for the jury.

This case holds with the minority rule that in some cases damages are recoverable for mental suffering. In most of the states the rule is that damages are not recoverable for mental suffering alone. *Chase v. Western Union Telegraph Co.*, 44 Fed. 554. The first departure in any way from the rule was made by allowing mental agony to increase the damage resulting from physical injury. *Phillips v. Hoyle*, 4 Gray 568 (Mass.).—Texas in 1881 first extended this rule and allowed recovery for mental suffering alone when occasioned by delay in the delivery of a telegram. *So. Relle v. Western Union Telegraph Co.*, 55 Texas 308. A minority of the states has followed this holding. *Green v. Western Union Telegraph Co.*, 136 N. C. 489. It must be apparent on the face of the message that delay in delivery will cause mental suffering. *Western Union Telegraph Co. v. Warren*, 36 S. W. 314 (Tex.). A few jurisdictions limit the right of recovery to the sender. *Western Union Telegraph Co. v. Henderson*, 89 Ala. 510. The law of the state to which the message is sent will govern whether a recovery shall be had or not. *Gray v. Tel. Co.*, 91 Am. St. Rep. 706.

## REVIEWS.

*Das Internationale Civilprocessrecht auf Grund der Theorie, Gesetzgebung, und Praxis.* F. Meili. Zürich, 1906.

The first and second parts of this work were issued separately in 1904. The third and last appeared last March, and the whole now makes one volume of some 600 pages. To cover the field of suits by or against foreigners, on foreign causes of action, and on causes of action ruled by foreign laws, within that space, was only possible by the method adopted of passing over lightly the details of procedure and emphasizing such general rules as are of wide acceptance. Dr. Meili's attention was specially turned to this subject as one of the Swiss delegates to each of the four Hague Conferences for the advancement of private international law; the *Bundesrat* having especially directed them to press the consideration of questions of conflicting jurisdiction between the courts of different nations. This work is also complementary to a previous one of his, "*Das internationale Civil-und Handelsrecht*" (Zürich, 1902), which was reviewed in the YALE LAW JOURNAL for January, 1905.

Any work of this nature must largely be a statement of differences and judicial inconsistencies. Its main office can only be to point to the sources to which to go in any particular case for information. Thus as to the competence of courts in matters of international concern—the subject his country particularly had at heart—he was forced to begin his treatment of the subject by the statement (page 197) that there is no established and universally recognized rule, but a court must apply, in the absence of a treaty, either such special laws of its sovereign as may cover the case or, if there be none, the ordinary laws governing jurisdiction in other cases.

The author's general mode of proceeding, in the absence of any rule universally received to which he can refer, is to take up the practice prevailing in the principal nations of the civilized world, considering them in order, and referring with respect to each to such treaties, statutes and judicial decisions as may be most helpful, as well as to the opinions of its jurists. For a foreigner to attempt to give the statute law of any country on any point is always difficult. His information is generally of a secondary character, and he is fortunate if he can cite from a book not five years old. But in five years the whole legislative policy of a nation, on a question of international bearing, is often reversed.

Dr. Meili feels hopeful of the submission, as time goes on, of many cases to some tribunal of an international character, which now encumber local courts, or become sources of international controversy, and refers (page 279) to Article 23 of the universal postal union as a serious beginning already made.

American lawyers will take a special interest in reading what the author has to say as to the forensic domicile, which now figures so largely in our own corporation laws. In France, every corporate shareholder under certain circumstances, as in case of the insolvency of the company (pages 311, 327) must elect such a domicile at a particular place in Paris, and answer to all process there served upon him.

France and Switzerland entered into a treaty in 1869 (given on p. 569) which regulates judicial proceedings in which their citizens are engaged. The question arose in the Swiss courts whether a corporation incorporated by one of the powers was to be deemed a citizen of that power. The decision of the Bundesgericht (p. 326) was that the nationality of a corporation was determined by that of its shareholders, and not by the place where it had its corporate seat or its principal establishment. This result corresponds to that announced by the Supreme Court of the United States in the series of decisions culminating in *Ohio & Mississippi R. R. Co. v. Wheeler*, 1 Black. 286, and recently qualified in *Doctor v. Harrington*, 106 U. S. 579. It differs in principle from the project of an international treaty as to bankruptcies, adopted by the Hague Conference of 1904 for the advancement of private international law. That provides (Art. 2) that a corporation is to be thrown into bankruptcy only in the country where it has its corporate seat, provided this be not a fraudulent or fictitious one.

Much of what is said as to jurisdiction over foreigners in penal actions sounds strange to American ears. The Court of Appeals of Milan, for instance, (p. 184) has held that as well in regard to penal jurisdiction as on an appeal by a party damaged by a crime, from the award of damages, a foreigner, not living in Italy, ought to be deemed regularly summoned, by posting up the citation in a public place, without any effort to communicate personal notice. In cases of a judgment for contumacy or by default, this would be particularly unfavorable to the party proceeded against.

The author considers it a settled principle, generally accepted (p. 243), that a business establishment situated in a place other than the domicile of its proprietor, or, if that be an artificial or juristic person, its legal seat must in some practical fashion respond to suits instituted against it there. This he refers, not to any fiction of a domicile or quasi-domicile for the business, but to a necessary implication from its being set up in such a locality, and applies to branch establishments as well as to the principal one. Here our attachment process levied on the goods of non-resident debtors in an *in personam* action answers the same ends, though on a somewhat different theory.

A natural tendency is shown in this treatise to dwell on the practice in the Swiss courts and under treaties to which Switzerland is a party. Every man writes best about that which he knows best, and if the book shows some want of proportion on this account, it is certainly likely to be the more accurate for it. To American readers, also, the relations of the Swiss cantons to each other are of especial interest from their close analogy to those between our own States.

Many of the recommendations made from time to time by the Institute of International Law (of which Dr. Meili is an associate) as to matters of procedure, are mentioned with favor. Undoubtedly they are gradually promoting harmony in international adjudications, and all the more effectively from the absence of any authority not purely intrinsic.

The recent approaches of European States in respect to the execution of foreign judgments, through the work of the Hague Conferences, are clearly described, as well as those previously made by the international convention as to railway traffic, and the agreements as to the force to be given to decisions of riparian tribunals in matters of commerce on the Rhine (pages 461-463). In reference to the American doctrine, he has overlooked (page 488) the decisions of the Supreme Court denying the right of one of our States to impeach a judgment of another of them for fraud, as well as that of *Hilton v. Guyot*, 159 U. S. 113.

The work attempted by the author was such as to render some errors inevitable (See pages 290, 364, Preface IV); but in general it can be taken as a trustworthy statement of such rules and principles as control the disposition of causes of an international aspect in the several countries of the world. It is clearly written and well arranged. The bibliography of each subject treated has received special and careful attention.

S. E. B.

*Due Process of Law.* By Lucius Polk McGehee, Professor of Law in the University of North Carolina. Edward Thompson Company, Northport, Long Island, N. Y. 1906. Cloth. Pages 451.

This contribution of Professor McGehee to a series of "Studies in Constitutional Law" will be welcomed as a clear treatment of one of the most important topics in American law. As is stated in the prefatory remarks: "No richer or more interesting field could offer itself to the student or practitioner." The book is confined to an investigation of the provisions in the Constitution of the United States to the effect that no person shall be deprived of life, liberty or property without due process of law, and the treatment of similar prohibitions in state constitutions is merely incidental.

To a clear understanding of the rights and privileges which are secured to a citizen by such constitutional guarantees, the author at the outset says: "Due process of law implies the administration of equal laws according to established rules not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing." Having thus defined the term, he proceeds to discuss its essential elements and particularly the matter of jurisdiction, necessarily taking up the subject of divorce and in a most clear manner pointing out the holdings of the federal courts upon this complicated question. The text was written before the rendition of the decision in the case of *Haddock v. Haddock*, but that case is referred to and the doctrine therein laid down criticised in the preface. Then follows an enu-

meration of the rights and persons protected by these provisions, involving a consideration of procedure and its relation to the subject. The author then proceeds to consider the paramount rights of the state under the heads, "Taxation," "Eminent Domain" and "The Police Power" in the discussion of which are cited some of the most noted American decisions. The treatment of the entire subject is most satisfactory.

G. S. V. S.

*The Encyclopedia of Evidence.* Edited by Edgar W. Camp and John F. Crowe. Volume VIII. L. D. Powell Company, Los Angeles, 1906. Pages 1003. Sheep.

The eighth volume of this useful work on evidence has just appeared and fully maintains the high standard set by the preceding volumes. Beginning with the subject of "Kidnapping" this volume covers completely and exhaustively the whole field of evidence up to and including the subject of "New Trial." Owing to the method of treatment the work necessarily includes some matter hardly belonging to a work on evidence, but in general the author has realized his object, viz.: to include all the law of evidence—using the term in its broadest sense—and to exclude everything not naturally included under that head. Instead of presenting original theories the author states the rules as he finds them and then proceeds to cite a few cases which are directly in point on each proposition stated. The citations represent almost all jurisdictions and are supplemented by apt quotations from the leading cases. An excellent feature of the work is the reference not only to the state reports, but also to the National Reporter System and to the American Reports and Decisions.

J. M. F.

*The Law of Automobiles.* By Xenophon P. Huddy. Matthew Bender & Company, Albany, N. Y., 1906. Buckram. Pages 367.

In this volume Mr. Huddy sets forth the principles of the law which apply to the automobile. Although the courts and the legislatures of the United States have been dealing with this particular branch of the law only about seven years there now exists a large amount of statutory law upon the subject. The author states that prior to the year 1899 neither the courts nor the legislatures of America had considered the subject. During the short period which has elapsed since then the courts as well as the legislatures have been called upon to consider questions concerning the automobile and its use and many very important decisions have been rendered. These have been collected and commented upon by Mr. Huddy so that the lawyer, the layman and the judge may now have the law in a convenient and accessible form.

The volume is divided into two parts. The first part deals with the general principles of the common law which define the status of the motor car and the rights and duties of owners, chaffeurs, garage keepers and manufacturers. One chapter of peculiar inter-



est and value is that which treats of proof of speed. Here the author has stated the principles which the courts have recognized and adopted regarding the many phases of this perplexing problem. In the second part of the volume the author has made an accurate compilation of all the state automobile laws in the United States and also the English Motor Car Act of 1903. This part of the volume will prove of great practical value to the tourist.

The book is well arranged and the principles of the law are clearly stated so that the layman as well as the lawyer will find it useful.

C. H. H.

*Trial Tactics.* By Andrew J. Hirschl of the Chicago Bar, author of "Combination of Corporations" and other works. T. H. Flood & Company, Chicago, Ill. Buckram, pages 264.

This work, while evidently intended for the use of the student and young practitioner may well be carefully consulted by all engaged in the active practice of the law. The book is of convenient size for handy reference, the type clear and bold, while the many illustrations of technical points hold the reader's attention on matters often overlooked as unimportant. The young lawyer who has had no office training and is therefore unfamiliar with the make-up of juries, the actual handling of witnesses, cross-examination and general court-room work will find the book of much assistance. The author goes right to the point in his suggestions for the protection of the client and the treatment of opposing counsel, but all through the work will be noticed evidence of a high regard for the ethics of the profession.

F. P. M.

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## THE NEXT CONSTITUTIONAL CONVENTION OF THE UNITED STATES.

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Philadelphia is one of the great cities of the world. To the student of history who remembers that Nineveh and Palmyra, Carthage and Thebes, and many another, have been great, populous and wealthy, and then have passed entirely away from the thoughts and lips of men, Philadelphia has yet a glory that shall live always. Mohammedanism has its Mecca, the cradle and the acme of its hopes. Jew and Christian alike turn to Jerusalem. But to the utmost verge of earth, and to the last syllable of recorded time, in whatever language liberty and freedom shall be honored among men, in whatever accents government "of the people, by the people and for the people" shall be asserted, there Philadelphia shall be remembered as the cradle of its birth. Her streets at some far distant day may be overgrown with grass and her ruined and tottering buildings may become the home of bats and birds of night; but around her name will linger a luster that shall never depart.

There on 4 July, 1776, was proclaimed "Liberty throughout all the land and to all the inhabitants thereof." And there too, eleven years later, was another notable event, when on 17 September, 1787, was issued to the world the Constitution of these United States. It is of the latter—"its defects and the necessity for its revision"—that I wish to present my views.

Just here it is well to call to mind the radical difference between these two Conventions. That which met in 1776 was frankly democratic. Success in its great and perilous undertaking was only possible with the support of the people. The Great Declaration was an appeal to the masses. It declared that all men were "created equal and endowed with certain inalienable rights—among them life, liberty and the pursuit of happiness—to secure which rights

governments are instituted, deriving their just powers from the consent of the governed; and that when government becomes destructive of these ends, it is the right of the people to alter or abolish it, and institute a new government in such form as shall seem most likely to effect their safety and happiness." Never was the right of revolution more clearly asserted or that government existed for the sole benefit of the people, who were declared to be equal and endowed with the right to change their government at will when it did not subserve their welfare or obey their wishes. Not a word about property. Everything was about the people. The man was more than the dollar then. And the Convention was in earnest. Every member signed the Declaration, which was unanimously voted. As Dr. Franklin pertinently observed, it behooved them "to hang together or they would be hanged separately."

The Convention which met in 1787 was as reactionary as the other had been revolutionary and democratic. It had its beginning in commercial negotiations between the States. Wearied with a long war, enthusiasm for liberty somewhat relaxed by the pressing need to earn the comforts and necessities of life whose stores had been diminished, and oppressed by the ban upon prosperity caused by the uncertainties and impotence of the existing government of the Confederacy, the Convention of 1787 came together. Ignoring the maxim that government should exist only by the consent of the governed, it sat with closed doors, that no breath of the popular will should affect their decisions. To free the members from all responsibility, members were prohibited to make copies of any resolution. Any record of Yeas and Nays was forbidden and was kept without the knowledge of the Convention. The journal was kept secret, a vote to destroy it fortunately failed, and Mr. Madison's copy was published only after the lapse of forty-nine years, when every member had passed beyond human accountability. Only 12 States were ever represented, and one of these withdrew before the final result was reached. Of its 65 members only 55 ever attended, and so far from being unanimous, only 39 signed the Constitution, and some actively opposed its ratification by their own States.

That the Constitution thus framed was reactionary was a matter of course. There was, as we know, some talk of a royal government with Frederick, Duke of York, second son of George the Third, as King. Hamilton, whose subsequent great services as Secretary of the Treasury have crowned him with a halo, and whose tragic death has obliterated the memory of his faults, declared him-

self in favor of the English form of government with its hereditary Executive and its House of Lords, which he denominated "a most noble institution." Failing in that, he advocated an Executive elected by Congress for life, Senators and Judges for life, and Governors of States to be appointed by the President. Of these he secured, as it has proved, the most important from his standpoint, the creation of Judges for life. The Convention was aware that a Constitution on Hamilton's lines could not secure ratification by the several States. But the Constitution adopted was made as undemocratic as possible, and was very far from responding to the condition, laid down in the Declaration of 1776, that all governments derive their just powers from the consent of the governed. Hamilton, in a speech to the Convention, stated that the members were agreed that "we need to be rescued from the democracy." They were rescued.

In truth, the consent of the governed was not to be asked. In the new government the will of the people was not to control and was little to be consulted. Of the three great departments of the government—Legislative, Executive, and Judiciary—the people were entrusted with the election only of the House of Representatives, to wit, only one-sixth of the government, even if that House had been made equal in authority and power with the Senate, which was very far from being the case. The Declaration of 1776 was concerned with the rights of man. The Convention of 1787 entirely ignored them. There was no Bill of Rights and the guarantees of the great rights of freedom of speech and of the press, freedom of religion, liberty of the people to assemble, and right of petition, the right to bear arms, exemption from soldiers being quartered upon the people, exemption from general warrants, the right of trial by jury and a grand jury, protection of the law of the land and protection from seizure of private property for other than public use, and then only upon just compensation; the prohibition of excessive bail or cruel and unusual punishment, and the reservation to the people and the States of all rights not granted by the Constitution—all these matters of the utmost importance to the rights of the people—were omitted and were inserted by the first ten amendments only because it was necessary to give assurances that such amendments would be adopted in order to secure the ratification of the Constitution by the several States.

The Constitution was so far from being deemed satisfactory, even to the people and in the circumstances of the time for which it was framed, that, as already stated, only 11 States voted for its

adoption by the Convention, and only 39 members out of 55 attending signed it, some members subsequently opposing its ratification. Its ratification by the conventions in the several States was carried with the greatest difficulty, and in no State was it submitted to a vote of the people themselves. Massachusetts ratified only after a close vote and with a demand for amendments. South Carolina and New Hampshire also demanded amendments, as also did Virginia and New York, both of which voted ratification by the narrowest majorities and reserving to themselves the right to withdraw, and two States rejected the Constitution and subsequently ratified only after Washington had been elected and inaugurated—matters in which they had no share.

George Washington was President of the Convention, it is true, but as such was debarred from sharing in the debates. His services, great as they were, had been military, not civil, and he left no impress upon the instrument of union so far as known. Yet it was admitted that but for his popularity and influence the Constitution would have failed of ratification by the several States, especially in Virginia. Indeed, but for his great influence the Convention would have adjourned without putting its final hand to the Constitution, as it came very near doing. Even his great influence would not have availed but for the overwhelming necessity for some form of government as a substitute for the rickety "Articles of Confederation," which were utterly inefficient and whose longer retention threatened civil war.

An instrument so framed, adopted with such difficulty and ratified after such efforts, and by such narrow margins, could not have been a fair and full expression of the consent of the governed. The men that made it did not deem it perfect. Its friends agreed to sundry amendments, ten in number, which were adopted by the first Congress that met. The assumption by the new Supreme Court of a power not contemplated, even by the framers of the Constitution, to drag a State before it as defendant in an action by a citizen of another State, caused the enactment of the Eleventh Amendment. The unfortunate method prescribed for the election of President nearly caused a civil war in 1801 and forced the adoption of the Twelfth Amendment, and three others were brought about as the result of the great Civil War. The Convention of 1787 recognized itself that the defects innate in the Constitution and which would be developed by experience and the lapse of time, would require amendments, and that instrument prescribed two different methods by which amendments could be made.

Our Federal Constitution was adopted 119 years ago. In that time every State has radically revised its Constitution, and most of them several times. Indeed, the Constitution of New York requires that the question of a Constitutional Convention shall be submitted to its people at least once every twenty years. The object is that the organic law shall keep abreast of the needs and wants of the people and shall represent the will and progress of to-day, and shall not, as is the case with the Federal Constitution, be hampered by provisions deemed best by the divided counsels of a small handful of men, in providing for the wants of the government of nearly a century and a quarter ago. Had those men been gifted with divine foresight and created a Constitution fit for this day and its development, it would have been unsuited for the needs of the times in which it was fashioned.

When the Constitution was adopted in 1787 it was intended for 3,000,000 of people, scattered along the Atlantic slope, from Massachusetts to the southern boundary of Georgia. We are now trying to make it do duty for very nearly 100,000,000, from Maine to Manila, from Panama and Porto Rico to the Pole. Then our population was mostly rural, for three years later, at the first Census in 1790, we had but five towns in the whole Union which had as many as 6,500 inhabitants each, and only two others had over 4,000. Now we have the second largest city on the globe, with over 4,000,000 of inhabitants, and many that have passed the half million mark, some of them of over a million population. Three years later, in 1790, we had 75 post-offices with \$37,000 annual post-office expenditures. Now we have 75,000 post-offices, 35,000 rural delivery routes and a post-office appropriation of nearly \$200,000,000.

During the first ten years the total expenditures of the Federal Government, including payments on the Revolutionary debts, and including even the pensions, averaged \$10,000,000 annually. Now the expenditures are seventy-five times as much. When the Constitution was adopted Virginia was easily the first State in influence, population and wealth, having one-fourth the population of the entire Union. North Carolina was third, and New York, which then stood fifth, now has double the population of the whole country at that date, and several other States have now a population greater than the original Union, whose very names were then unheard and over whose soil the savage and the buffalo roamed unmolested. Steamboats, railroads, gas, electricity (except as a toy in Franklin's hands), coal mines, petroleum, and a thousand other things which are a part of our lives to-day, were undiscovered.

Corporations, which now control the country and its government, were then so few that not till four years later, in 1791, was the first bank incorporated (in New York), and the charter for the second bank was only obtained by the subtlety of Aaron Burr, who concealed the banking privileges in an act incorporating a water company—and corporations have had an affinity for water ever since.

Had the Constitution been perfectly adapted to the needs and wishes of the people of that day, we would still have outgrown it. Time has revealed flaws in the original instrument, and it was, as might be expected, wholly without safeguards against that enormous growth of corporations, and even of individuals, in wealth and power, which has subverted the control of the government.

The glaring defect in the Constitution was that it was not democratic. It gave, as already pointed out, to the people—to the governed—the selection of only one-sixth of the government, to wit, one-half—by far the weaker half—of the Legislative Department. The other half, the Senate, was made elective at second hand by the State Legislatures, and the Senators were given not only longer terms, but greater power, for all Presidential appointments, and treaties, were subjected to confirmation by the Senate.

The President was intended to be elected at a still further remove from the people, by being chosen by electors, who, it was expected, would be selected by the State Legislatures. The President thus was to be selected at third hand, as it were. In fact, down till after the memorable contest between Adams, Clay, Crawford and Jackson, in 1824, in the majority of the States the Presidential electors were chosen by the State Legislatures, and they were so chosen by South Carolina till after the Civil War, and, in fact, by Colorado in 1876. The intention was that the electors should make independent choice, but public opinion forced the transfer of the choice of electors from the Legislatures to the ballot-box, and then made of them mere figure-heads, with no power but to voice the will of the people, who thus captured the Executive Department. That Department, with the House of Representatives, mark to-day the extent of the share of the people in this government.

The Judiciary were placed a step still further removed from the popular choice. The Judges were to be selected at fourth hand by a President (intended to be selected at third hand) and subject to confirmation by a Senate chosen at second hand. And to make the Judiciary absolutely impervious to any consideration of the "consent of the governed," they are appointed for life.

It will be seen at a glance that a Constitution so devised was intended not to express, but to suppress, or at least disregard, the wishes and the consent of the governed. It was admirably adapted for what has come to pass—the absolute domination of the government by the “business interests” which, controlling vast amounts of capital and intent on more, can secure the election of Senators by the small constituencies, the Legislatures which elect them, and can dictate the appointment of the Judges, and if they fail in that, the Senate, chosen under their auspices, can defeat the nomination. Should the President favor legislation and the House of Representatives pass the bill, the Senate, with its majority chosen by corporation influences, can defeat it; and if by any chance it shall yield to the popular will and pass the bill, as was the case with the income tax, there remains the Judiciary, who have assumed, without any warrant, express or implied in the Constitution, the power to declare any act unconstitutional at their own will and without responsibility to any one.

The people’s part in the government in the choice of the House of Representatives, even when reinforced by the Executive, whose election they have captured, is an absolute nullity in the face of the Senate and the Judiciary, in whose selection the people have no voice. This, therefore, is the government of the United States—a government by Senate and Judges—that is to say, frankly, by whatever power can control the selection of Senators and Judges. What is that power? We know that it is not the American people.

Let us not be deceived by forms, but look at the substance. Government rests not upon forms, but upon a true reply to the question, “Where does the governing power reside?” The Roman legions bore to the last day of the empire upon their standards the words, “The Senate and the Roman People,” long centuries after the real power had passed from the *curia* and the *comitia* to the barracks of the Pretorian Guards, and when there was no will in Rome save that of their master. There were still Tribunes of the People, and Consuls, and a Senate, and the title of a Republic; but the real share of the people in the Roman government was the donation to them of “bread and circuses” by their tyrants.

Years after the victor of Marengo had been crowned Emperor and the sword of Austerlitz had become the one power in France, the French coins and official documents still bore the inscription of “French Republic”—“*République Française*.”

In England to-day there is a monarchy in form, but we know that in truth the real government of England is vested in a single



House of Parliament, elected by the people, under a restricted suffrage; that the real Executive is not the King, but the Prime Minister and his cabinet, practically elected by that House of Commons; that the King has not even the veto power, except nominally, since it has not been exercised in a single instance for more than 200 years, and that the sole function of the House of Lords—a club of rich men representing great vested interests—is in the exercise of a suspensive veto (of which the King has been deprived), which is exercised only till the Commons make up their mind the bill shall pass—when the House of Lords always gives way, as the condition upon which their continued existence rests. So in this country, we retain the forms of a Republic. We still choose our President and the House of Representatives by the people; but the real power does not reside in them or in the people. It rests with those great “interests” which select the majority of the Senate and the Judges.

This being the situation, the sole remedy possible is by amendment of the Constitution to make it democratic, and place the selection of these preponderating bodies in the hands of the people.

First, the election of Senators should be given to the people. Even then consolidated wealth will secure some of the Senators; but it would not be able, as now, at all times to count with absolute certainty upon a majority of the Senate as its creatures. Five times has a bill, proposing such amendment to the Constitution, passed the House of Representatives by a practically unanimous vote, and each time it has been lost in the Senate; but never by a direct vote. It has always been disposed of by the chloroform process of referring the bill to a committee, which never reports it back, and never will. It is too much to expect that the great corporations which control a majority of the Senate will ever voluntarily transfer to the people their profitable and secure hold upon supreme power by permitting the passage of an amendment to elect Senators by the people. The only hope is in the alternative plan of amendment, authorized by the Constitution, to wit, the call of a Constitutional Convention upon the application of two-thirds of the States, to wit, thirty States. More than that number have already instructed in favor of an amendment to elect Senators by the people.

It may be recalled here that in the Convention of 1787 Pennsylvania did vote for the election of Senators by the people. A strong argument used against this was that the farming interest, being the largest, would control the House and that the Senate could only be given to the commercial interests by making its members elective by the Legislatures—which was prophetic—though the

deciding influence was the fear of the small States that if the Senate was elected by the people its membership would be based on population.

It is high time that we had a Constitutional Convention, after the lapse of nearly a century and a score of years. The same reasons which have time and again caused the individual States to amend their Constitutions imperatively require a Convention to adjust the Constitution of the Union to the changed conditions of the times and to transfer to the people themselves that control of the government which is now exercised for the profit and benefit of the "interest." Those interests, with all the power of their money and the large part of the press which they own or control, will resist the call of such a Convention. They will be aided, doubtless, by some of the smaller States who may fear a loss of their equal representation in the Senate. But in truth and justice it may be that there might be some modification now in that respect without injury to the smaller States. There is no longer any reason why Delaware, or Nevada, or Rhode Island should have as many Senators as New York, or Pennsylvania, or Illinois. It would be enough to grant to every State having a million of inhabitants or less, one Senator, and to allot to each State having over one million of inhabitants an additional Senator for every million above one million and for a fractional part if over three-quarters of a million. This, while not putting the Senate frankly on the basis of population, would remove the dissatisfaction with the present unjust ratio and would quiet the opposition to the admission of new States whose area and development entitle them to self-government, but whose population does not entitle them to two Senators.

The election of President is now made by the people, who have captured it, though the Constitution did not intend the people should have any choice in naming the Executive. The dangerous and unsafe plan adopted in 1787 was changed in consequence of the narrowly-averted disaster in 1801. But the method in force still leaves much to be desired. It readily lends itself to the choice of a minority candidate. It is an anomaly that 1,100 votes in New York (as in 1884) should swing 70 electoral votes (35 from one candidate to the other) and thus decide the result. The consequence is that while, nominally, any citizen of the Republic is eligible to the Presidency, only citizens of two or three of the larger States, with doubtful electoral votes, are in fact eligible. All others are barred. For proof of this, look at the history of our Presidential electors. For the first forty years of the Union the presidents were confined to

two States—Virginia and Massachusetts. Then there came a period when the growing West required recognition, and Tennessee, Ohio, and New York commanded the situation for the next sixteen years. The Mexican War gave us a soldier who practically represented no State, and was succeeded by a New Yorker. Then for the only time in our history “off States” had a showing, and Pennsylvania and New Hampshire had their innings. Since then the successful candidates have been again strictly limited to “pivotal States”—New York in the East and Illinois, Indiana and Ohio in the West.

This condition is unsatisfactory. The magnetic Blaine from Maine was defeated, as was Bryan from Nebraska. Had the former hailed from New York and the latter from Illinois, the electoral votes and influence of those States would have secured their election.

It would be dangerous, and almost a certain provocation of civil war, to change the election of President to a per capita vote by the whole of the Union. Then a charge of a fraudulent vote at any precinct or voting place, however remote, might affect the result; and as frauds would most likely occur in those States where the majorities are largest—as in Pennsylvania or Texas, Ohio or Georgia—a contest would always be certain. Whereas, now, frauds in States giving large majorities, unless of great enough magnitude to change the electoral vote of the whole State, can have no effect. The remedy is, preserving the electoral vote system as now, and giving the smaller States, as now, the advantage of electoral votes to represent their Senators, to divide the electoral vote of each State according to the popular vote for each candidate, giving each his pro rata of the electoral vote on that basis, the odd elector being apportioned to the candidate having the largest fraction. Thus in New York, Mr. Blaine would have gotten 17 electoral votes and Mr. Cleveland 18. Other States would have also divided, more or less evenly; but the result would be that the choice of President would no longer be restricted to two or three States, as in our past history, and is likely to be always the case as long as the whole electoral vote of two or three large pivotal States must swing to one side or other and determine the result. This change would avoid the present evil of large sums being spent to carry the solid electoral vote of “pivotal” States, for there would cease to be “pivotal” States. At the same time this would avoid the open gulf into which a per capita ballot by the whole Union would lead us. While the electoral vote of a State should be divided, pro

rata, according to the popular vote for each candidate, it is essential that each State should vote as one district, since its boundaries are unchangeable. To permit the Legislature of each State to divide it into electoral districts would simply open up competition in the art of gerrymandering.

By the Convention of 1787 the term of the President was originally fixed at seven years and he was made ineligible for re-election. This was reduced to four years by a compromise that he could be re-elected without limitation. This was done in the interest of those who favored a strong government and a long tenure. Washington imposed a limitation by his example which will not always be binding. An amendment making the term six years and the President ineligible to re-election has long been desired by a large portion of the public. Indeed, when the Constitutional Convention of the Union shall assemble, as it must do some day, to remodel our Constitution to fit it to face the dangers and conform to the views of the people of this age, with the aid of our experience, in the past, it is more than probable that the powers of the Executive will be more restricted. His powers are now greater than those of any sovereign in Europe. The real restrictions upon Executive power at present are not in Constitutional provisions, but in the Senate and Judiciary, which often negate the popular will, which he represents more accurately than they.

And now we come to the most important of the changes necessary to place the government of the Union in the hands of the people. By far the most serious defect and danger in the Constitution is the appointment of Judges for life, subject to confirmation by the Senate. It is a far more serious matter than it was when the Convention of 1787 framed the Constitution. A proposition was made in the Convention—as we now know from Mr. Madison's Journal—that the Judges should pass upon the constitutionality of acts of Congress. This was defeated 5 June, receiving the vote of only two States. It was renewed no less than three times, *i. e.*, on 6 June, 21 July, and finally again for the fourth time on 15 August; and though it had the powerful support of Mr. Madison and Mr. James Wilson, at no time did it receive the votes of more than three States. On this last occasion (15 August) Mr. Mercer thus summed up the thought of the Convention: "He disapproved of the doctrine, that the Judges, as expositors of the Constitution, should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be incontrovertible."

The subsequent action of the Supreme Court in assuming the

power to declare acts of Congress unconstitutional was without a line in the Constitution to authorize it, either expressly or by implication. The Constitution recited carefully and fully the matters over which the courts should have jurisdiction, and there is nothing, and after the above vote four times refusing jurisdiction there could be nothing, indicating any power to declare an act of Congress unconstitutional and void.

Had the Convention given such power to the courts, it certainly would not have left its exercise final and unreviewable. It gave the Congress power to override the veto of the President, though that veto was expressly given, thus showing that in the last analysis the will of the people, speaking through the legislative power, should govern. Had the Convention supposed the courts would assume such power, it would certainly have given Congress some review over judicial action and certainly would not have made the Judges irretrievably beyond "the consent of the governed" and regardless of the popular will by making them appointive, and further clothing them with the undemocratic prerogative of tenure for life.

Such power does not exist in any other country, and never has. It is, therefore, not essential to our security. It is not conferred by the Constitution, but, on the contrary, the Convention, as we have seen, after the fullest debate, four times, on four several days, refused by a decisive vote to confer such power. The Judges not only have never exercised such power in England, where there is no written Constitution, but they do not exercise it in France, Germany, Austria, Denmark, or in any other country which, like them, has a written Constitution.

A more complete denial of popular control of this government could not have been conceived than the placing such unreviewable power in the hands of men, not elected by the people, and holding office for life. The legal-tender act, the financial policy of the government, was invalidated by one court and then validated by another, after a change in its *personnel*. Then the income tax, which had been held constitutional by the Court for an hundred years, was again so held, and then by a sudden change of vote by one Judge it was held unconstitutional, nullified and set at naught, though it had passed by a nearly unanimous vote both Houses of Congress, containing many lawyers who were the equals, if not the superiors of the vacillating Judge, and had been approved by the President and voiced the will of the people. This was all negatived (without any warrant in the Constitution for the Court to set aside an act of Congress) by the vote of one Judge; and thus one

hundred million dollars, and more, of annual taxation, was transferred from those most able to bear it and placed upon the backs of those who already carried more than their fair share of the burdens of government. Under an untrue assumption of authority given by thirty-nine dead men one man nullified the action of Congress and the President and the will of seventy-five millions of living people, and in the thirteen years since has taxed the property and labor of the country, by his sole vote, \$1,300,000,000, which Congress, in compliance with the public will and relying on previous decisions of the Court, had decreed should be paid out of the excessive incomes of the rich.

In England one-third of the revenue is derived from the superfluities of the very wealthy, by the levy of a graduated income tax, and a graduated inheritance tax, increasing the per cent with the size of the income. The same system is in force in all other civilized countries. In not one of them would the hereditary monarch venture to veto or declare null such a tax. In this country, alone, the people, speaking through their Congress, and with the approval of their Executive, cannot put in force a single measure of any nature whatever with assurance that it shall meet with the approval of the courts; and its failure to receive such approval is fatal, for, unlike the veto of the Executive, the unanimous vote of Congress (and the income tax came near receiving such vote) cannot avail against it. Of what avail shall it be, if Congress shall conform to the popular demand and enact a "Rate Regulation" bill and the President shall approve it, if five lawyers, holding office for life and not elected by the people, shall see fit to destroy it, as they did the income tax law? Is such a government a reasonable one, and can it be longer tolerated after 120 years of experience have demonstrated the capacity of the people for self-government? If five lawyers can negative the will of 100,000,000 of men, then the art of government is reduced to the selection of those five lawyers.

A power without limit, except in the shifting views of the Court, lies in the construction placed upon the Fourteenth Amendment, which passed, as every one knows, solely to prevent discrimination against the colored race, has been construed by the Court to confer upon it jurisdiction to hold any provision of any statute whatever "not due process of law." This draws the whole body of the reserved rights of the States into the maelstrom of the Federal Courts, subject only to such forbearance as the Federal Supreme Court of the day, or in any particular case, may see fit to exercise. The limits between State and Federal jurisdiction depend upon the

views of five men at any given time; and we have a government of men and not a government of laws, prescribed beforehand.

The preservation of the autonomy of the several States and of local self-government is essential to the maintenance of our liberties, which would expire in the grasp of a consolidated despotism. Nothing can save us from this centripetal force but the speedy repeal of the Fourteenth Amendment or a recasting of its language in terms that no future court can misinterpret it.

The vast political power now asserted and exercised by the court to set aside public policies, after their full determination by Congress, cannot safely be left in the hands of any body of men without supervision or control by any other authority whatever. If the President errs, his mandate expires in four years, and his party as well as himself is accountable to the people at the ballot-box for his stewardship. If members of Congress err, they too must account to their constituents. But the Federal Judiciary hold for life, and though popular sentiment should change the entire *personnel* of the other two great departments of government, a whole generation must pass away before the people could get control of the Judiciary, which possesses an irresponsible and unrestricted veto upon the action of the other departments—irresponsible because impeachment has become impossible, and if it were possible, it could not be invoked as to erroneous decisions, unless corruption were shown.

The control of the policy of government is thus not in the hands of the people, but in the power of a small body of men not chosen by the people and holding for life. In many cases which might be mentioned, had the Court been elective, men not biased in favor of colossal wealth would have filled more seats upon the bench, and if there had been such decision as in the income tax case, long ere this, under the tenure of a term of years, new incumbents would have been chosen, who, returning to the former line of decisions, would have upheld the right of Congress to control the financial policy of the government in accordance with the will of the people of this day and age, and not according to the shifting views which the Court has imputed to language used by the majority of the fifty-five men who met in Philadelphia in 1787. Such methods of controlling the policy of a government are no whit more tolerable than the conduct of the augurs of old who gave the permission for peace or war, for battle or other public movements, by declaring from the flight of birds, the inspection of the entrails of fowls, or other equally wise devices, that the omens were lucky or unlucky—the

rules of such divination being in their own breasts and hence their decisions beyond remedy.

It may be that this power in the courts, however illegally grasped originally, has been too long acquiesced in to be now questioned. If so, the only remedy which can be applied is to make the Judges elective, and for a term of years, for no people can permit its will to be denied, and its destinies shaped, by men it did not choose and over whose conduct it has no control, by reason of its having no power to change them and select other agents at the close of a fixed term.

Every Federal Judgeship below the Supreme Court can be abolished by an act of Congress, since the power which creates a Federal district or circuit can abolish it at will. If Congress can abolish one, it can abolish all. Several districts have from time to time been abolished, notably two in 1801; and we know that the sixteen Circuit Judges created by the Judiciary Act of 1801 were abolished eighteen months later.

It is true that under the stress of a great public sentiment every United States District and Circuit Judge can be legislated out of office by a simple act of Congress, and a new system recreated with new Judges. It is also true, as has been pointed out by distinguished lawyers, that while the Supreme Court cannot be thus abolished, it exercises its appellate functions "with such exceptions and under such regulations as Congress shall make" (Const., Art. III, sec. 2), and as Congress enacted the Judiciary Act of 1789, it has often amended it, and can repeal it. Judge Marshall recognized this in *Marbury v. Madison*, in which case in an *obiter* opinion he had asserted the power to declare an act of Congress unconstitutional, for he wound up by refusing the logical result, the issuing of the mandamus sought, because Congress had not conferred jurisdiction upon the Supreme Court to issue it.

In 1831 the attempt was made to repeal section 25 of the Judiciary Act of 1789, by virtue of which writs of error lay to the State Supreme Courts in certain cases. Though the section was not repealed, the repeal was supported and voted for by both Henry Clay, James K. Polk, and other leaders of both of the great parties of that day. But what is needed is not the exercise of these powers which Congress undoubtedly possesses and in an emergency will exercise, but a constitutional revision by which the Federal Judges, like other public servants, shall be chosen by the people for a term of years.

It may be said that the Federal Judges are now in office for life



and it would be unjust to dispossess them. So it was with the State Judges in each State when it changed from life Judges to Judges elected by the people; but that did not stay the hand of a much-needed reform.

It must be remembered that when our Federal Constitution was adopted in 1787, in only one State was the Governor elected by the people, and the Judges in none, and that in most, if not all, the States, the Legislature, especially the Senate branch, was chosen by a restricted suffrage. The schoolmaster was not abroad in the land, the masses were illiterate and government by the people was a new experiment and property-holders were afraid of it. The danger to property rights did not come then, as now, from the other direction—from the corporations and others holding vast accumulations of capital and by its power threatening to crush those owning modest estates.

In the State governments the conditions existing in 1787 have long since been changed. In all the States the Governor and the members of both branches of the Legislature have long since been made elective by manhood suffrage. In all the forty-five States save four (Delaware, Massachusetts, New Hampshire, and Rhode Island), the Judges now hold for a term of years, and in three of these they are removable (as in England) upon a majority vote of the Legislature, thus preserving a supervision of their conduct which is utterly lacking as to the Federal Judiciary. In Rhode Island the Judges were thus dropped summarily, once, when they had held an act of the Legislature invalid. In thirty-three States the Judges are elected by the people, in five States by the Legislature and in seven States they are appointed by the Governor with the consent of the Senate. Even in England the Judges hold office subject to removal upon the vote of a bare majority in Parliament—though there the Judges have never asserted any power to set aside an act of Parliament. There the will of the people, when expressed through their representatives in Parliament, is final. The King cannot veto it, and no Judge has ever dreamed he had power to set it aside.

There are those who believe and have asserted that corporate wealth can assert such influence that even if Judges are not actually selected by the great corporations, no Judge can take his seat upon the Federal bench if his nomination and confirmation are opposed by the allied plutocracy. It has never been charged that such Judges are corruptly influenced. But the passage of a Judge from the bar to the bench does not necessarily destroy his prejudices or

his predilections. If they go upon the bench knowing that this potent influence if not used for them, at least withheld its opposition to their appointment, or their confirmation, and usually with a natural and perhaps unconscious bias from having spent their lives at the bar in advocacy of corporate claims, this will unconsciously, but effectively, be reflected in the decisions they make. Having attempted as lawyers to persuade courts to view debated questions from the standpoint of aggregated wealth, they often end by believing sincerely in the correctness of such views, and not unnaturally put them in force when in turn they themselves ascend the bench. This trend in Federal decisions has been pronounced. Then, too, incumbents of seats upon the Federal Circuit and District bench cannot be oblivious to the influence which procures promotion; and how fatal to confirmation by the plutocratic majority in the Senate will be the expression of any judicial views not in accordance with the "safe, sane and sound" predominance of wealth.

As far back as 1820, Mr. Jefferson had discovered the "sapping and mining," as he termed it, of the life-tenure, appointive Federal Judiciary, owing no gratitude to the people for their appointment and fearing no inconvenience from their conduct, however arbitrary, in the discharge of such office. In short, they possess the autocratic power of absolute irresponsibility. "Step by step, one goes very far," says the French proverb. This is true of the Federal Judiciary. Compare their jurisdiction in 1801, when Marshall ascended the bench, and their jurisdiction in 1906. The Constitution has been remade and rewritten by the judicial glosses put upon it. Had it been understood in 1787 to mean what it is construed to mean to-day, it is safe to say that not a single State would have ratified it.

An elective Judiciary is less partisan, for in many States half the Judges are habitually taken from each party, and very often in other States the same men are nominated by both parties, as notably the recent selection by a Republican convention of a Democratic successor to Judge Parker. The organs of plutocracy have asserted that in one State the elective Judges are selected by the party boss. But they forget that if that is true, he must in such a condition of affairs name the Governor too, and through the Governor he would select the appointive Judges. If the people are to be trusted to select the Executive and the Legislature, they are fit to select the Judges. The people are wiser than the appointing power which, viewing Judgeships as patronage, has with scarcely an exception

filled the Federal bench with appointees of its own party. Public opinion, which is the corner-stone of free government, has no place in the selection or supervision of the judicial augurs who assume power to set aside the will of the people when declared by Congress and the Executive. Whatever their method of divination, equally with the augurs of old they are a law to themselves and control events.

As was said by a great lawyer lately deceased, Judge Seymour D. Thompson, in 1891 (25 Am. Law Review, 288): "If the proposition to make the Federal Judiciary elective instead of appointive is once seriously discussed before the people, *nothing can stay the growth of that sentiment*, and it is almost certain that every session of the Federal Supreme Court will furnish material to stimulate that growth."

Great aggregations of wealth know their own interests, and it is very certain that there is no reform and no constitutional amendment that they will oppose more bitterly than this. What, then, is the interest of all others in regard to it?

Another undemocratic feature of the Constitution is that which requires all Federal officials to be appointed by the President or heads of departments. This is a great evil. Overwhelming necessity has compelled the enactment of the civil service law, which has protected many thousands of minor officials. But there has been no relief as to the 75,000 postmasters. When the Constitution was adopted there were only 75 postmasters, and it was contemplated that the President or Postmaster-General would really appoint. But this constitutional provision is a dead letter. The selection of this army of 75,000 postmasters, in a large majority of cases, is made by neither, but in the unconstitutional mode of selection by Senator, Member of the House, or a political boss. There is no reason why Congress should not be empowered by amendment to authorize the Department to lay off the territory patronizing each post-office as a district in which an election shall be held once in four years, at the time a member of Congress is chosen, and by the same machinery, the officer giving bond and being subject to the same supervision as now. Thus the people of each locality will get the postmaster they prefer, irrespective of the general result in the Union, relieving the Department at Washington of much call upon its time, which can be used for the public interest in some better way; and, besides, it will remove from the election of President and Members of Congress considerations of public patronage. Elec-

tions will then more largely turn upon the great issues as to matters of public policy.

Another obstruction to the effective operation of the popular will is the fact that, though Congressmen are elected in November, they do not take their seats (unless there is a called session) for thirteen months, and in the meantime the old Congress, whose policy may have been repudiated at the polls, sits and legislates in any event till 4 March following. This surely needs amendment, which fortunately can be done by statute. In England, France and other countries the old Parliament ceases before the election, and the new Assembly meets at once and puts the popular will into law.

In thus discussing the defects of the Federal Constitution I have but exercised the right of the humblest citizen. Few will deny that defects exist. I have indicated what, in my opinion, are the remedies. As to this, many will differ. If better can be found, let us adopt them. But could the matter be more appropriately discussed than on the spot where the original Constitution was debated?

For my part, I believe in popular government. The remedy for the halting, half-way popular government which we have is more democracy. When some one observed to Mr. Gladstone that the "people are not always right," he replied, "No; but they are rarely wrong." When they are wrong, their intelligence and their interests combine to make them correct the wrong. But when rulers, whether Kings, or life Judges, or great corporations, commit an error against the interest of the masses, there is no such certainty of correction.

The growth of this country in population and in material wealth has made it the marvel of the ages.

" But what avail the plow or sail,  
Or land or life, if freedom fail?"

The government and the destinies of a great people should always be kept in their own hands.

*Walter Clark, LL.D.*

## LIMITATION OF LIABILITY OF VESSEL OWNERS.

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The common law, as well as the civil law, made no distinction between the liability of an owner of a vessel for the negligent acts of his master and crew and the liability of an owner of a house for the negligent acts of his servants. But more than two centuries ago, France and Holland adopted laws in the interest of commerce, limiting the liability of vessel owners (not only for torts but for contracts of the master) to the value of the ship and freight. While it is frequently maintained that limited liability is one of the doctrines of the general maritime law, it is now accepted as the best authority that from these laws of France and Holland the doctrine of limited liability of vessel owners has sprung.

It was many years later, 1734, before England did anything to put her vessel owners on equal footing with the vessel owners of Continental Europe. While at the present time an English vessel owner may limit his liability in certain cases, he cannot limit below a certain sum, being required, in each instance where he is entitled to limit, to pay in so many pounds a ton, based upon the tonnage of the vessel, before he can avail himself of the benefits of the act. He cannot limit at all for contracts entered into by his master as his agent, England never having adopted the laws of Continental Europe in this respect.

To promote commerce, induce ship building and put our vessels on an equal footing with vessels of other nations, Congress adopted, in 1851, certain laws known as "An act to limit the liability of ship owners and for other purposes." By this act Congress conferred upon the United States District Courts jurisdiction in all cases brought to limit the liability of ship owners. The parts of the act more particularly within the purview of this article are now sections 4282 and 4283 of the General Statutes.

### SEC. 4282. LOSS BY FIRE:

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

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### **SEC. 4283. LIABILITY OF OWNER NOT TO EXCEED HIS INTEREST:**

The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

It has often impressed me as strange that vessel owners permit their cases, growing out of accidents on vessels, to be tried in a common law forum before a jury, when in almost every instance such forum is incompetent to give them complete justice. The only way I can account for it is that the law of Admiralty has been but meagerly taught in the universities and consequently lawyers, no matter how great their ability to try cases, have, because of this lack of training, not selected the proper forum and in many instances have consequently got their clients into expensive and prolonged litigation. The courts in the different states are to-day filled with cases that have been brought because of accidents happening on vessels. These courts, undoubtedly, have jurisdiction of the actions (although I have heard from law students that they have been taught that such actions could not be tried in a common law court) and these cases will probably be tried before a jury and the owner of the vessel, in many instances, be required to pay more than the value of his vessel. No doubt, every one of these cases could be removed to the United States District Court and the case tried in Admiralty before an Admiralty Judge where the owner of the vessel could get more perfect justice.

To illustrate the great benefit and importance of the limited liability act to a vessel owner, I will suppose a case under each statute.

Under section 4282. Suppose a small steamer worth \$10,000, carrying passengers and freight, while entering New Haven harbor, should take fire from an overheated boiler and destroy cargo, injure some passengers and kill others. Suits are brought for several times her value. The fire burned the steamer to the water's edge and her hull became practically useless so that her value was reduced to but a few dollars. Suppose that service could be obtained upon the owner in the states of New York, New Jersey and Connecticut and suits were brought against him for loss of cargo, injury to passengers and for loss of life, and suppose that some of these suits were brought in state courts in these states and some in the United States Courts. Suppose that the suits which were brought aggregated from fifty to sixty thousand dollars. The

owner of the steamer in such a case should file a libel and petition to limit his liability to the value of the wreck right after the accident. Of course, if there were any other paraphernalia belonging to the vessel, like a yawl boat, that should be surrendered also. Upon filing the libel and petition, the owner should either file a stipulation for value if he desires to keep the wreck, or if not, ask that it be surrendered to a trustee to sell, and in the libel and petition an injunction should be asked for, which, upon being signed by the district judge, all the various suits which have been brought in the different jurisdictions, whether in the state courts or in the United States Courts, would be at once stayed and all the various people who have brought suits would be brought into this one suit where they would have to answer the libel and petition and file their claims. Then the case would be tried, and unless the various claimants show under this statute that the fire from this overheated boiler was caused by the owner's "design or neglect," their suits must fail and the owner's libel and petition would not only be sustained but he would be relieved from all liability and the proceeds from the sale of the wreck, after paying the court expenses, would be paid to him; for in the petition to limit liability the owner does not concede that the various litigants are entitled to anything, but does, on the other hand, deny any liability just as he might had he tried each separate case in the forum in which it was brought.

Under the other statute, 4283, I will suppose that a small excursion steamer takes an excursion out from New Haven to some point in the sound. Upon returning she has a collision with a schooner, which collision injures several passengers and seriously damages the schooner, and that a libel is filed by the schooner for her injuries, in Admiralty, in the United States District Court, and that the passengers bring suits in the state courts. Suppose that the steamer were worth five thousand dollars, that the libel of the schooner alleges damages for six thousand dollars and that the actions brought by the different passengers were for ten thousand dollars more. A petition to limit the liability of the owner should be filed in the United States District Court, and suppose the steamer were not seriously damaged and the owner wanted to keep her. A stipulation for her value should be filed and an injunction asked for as in the other case. This would stay all the suits both in Admiralty and at common law and even if the court should find that the steamer were guilty of improper navigation and liable, the claimants could not get more than the value of the steamer which would have to be distributed pro rata among them unless the court found

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that the accident was not "without the privity or knowledge of the owner." If the court should so determine, it would dismiss the petition to limit liability and the various cases which had been stayed would then proceed in the different courts in which they had been brought.

It will be noticed from the two supposed cases that there is a distinction between the two statutes in that in the case of "design or neglect" under the statute in regard to fire, unless the owner is shown to be guilty of "design or neglect" it is an absolute limitation, while under section 4283, an owner's vessel may be held to blame for an accident even if it is occasioned "without the privity or knowledge of the owner," and yet the owner while he gets his limitation may be held liable up to the value of his vessel and pending freight for the voyage.

It will be noticed also that in case of fire both of the statutes may be used.

Whether an accident is within the privity or knowledge of the owner under the statute covers a very interesting class of cases in the Federal Reporter, which would be out of place to go into at length in this article. An illustration or two will, I believe, show how the statute has been interpreted.

The employing of a Chinese crew whose talk could not be understood by the officers was sufficient in a case on the Pacific Coast to deny the owner of the steamer a limitation of liability because the vessel was not seaworthy, having a crew which could not be understood and therefore was not properly manned and equipped, which it is the owner's duty to see is done.

A corporation in transporting passengers from the shore by means of a yawl-boat to its steamer, put more people into the yawl-boat than she was qualified to carry, which resulted in the boat's upsetting and several passengers losing their lives. The overloading of the yawl-boat was done in the presence of one of the officers of the corporation owning the steamer, and the overloading was therefore held to be with the privity or knowledge of the owner and a limitation of liability was denied.

A barge not having any tongs with which to discharge her cargo of rails, her captain borrowed some from another barge. The tongs borrowed were worn and inefficient and one of the employees in using them was injured. The owner was denied a limitation of liability for not supplying the barge with proper equipment suitable for the work in which she was engaged.

The employing of a captain who was shown to be inefficient,



which fact the owner of the boat ought to have known, was enough in a case where an accident occurred because of the captain's incompetency, to deny the owner the protection of the limited liability act.

These statutes at first did not apply to barges and canal boats, neither did they apply where an accident happened on vessels in bays, rivers and inland waters, but now they have been extended by different acts so that they apply to all waters navigable from the sea by vessels of ten tons or more and to the great lakes and to every kind of craft.

An act has also been passed which gives an owner in a vessel the right to limit his liability for any debts which may have been contracted for supplies for the vessel, to his interest in the vessel, so, if a managing owner of a vessel should run a vessel in debt beyond her value, an owner cannot be required to pay any more of the debt than his interest in the vessel is worth.

I have frequently had motions made to dismiss petitions for limitation of liability that I have filed, upon the ground that they were in violation of the Constitution in denying people a trial by jury. It is needless to say that such motions have never been successful.

Under the Constitution the judicial power of the United States is extended to all cases of Admiralty and Maritime jurisdiction. Congress has given the District Courts jurisdiction over all Admiralty and Maritime cases and has excepted all civil cases of Admiralty and Maritime jurisdiction from trial by jury. Hence, an accident happening on a vessel is within the limited liability act and under the Constitution is of Admiralty and Maritime jurisdiction and the District Courts have jurisdiction of such cases, and the case being a civil case of Admiralty and Maritime jurisdiction, it is excepted under the judiciary act from a trial by jury; therefore it must be obvious that the limited liability act which merely grants relief in cases that are within the Admiralty and Maritime jurisdiction, does not deny people a right of trial by jury, for they never had any right to a trial by jury of an Admiralty case and no state statute can give them such a right. If Congress had not passed the limited liability act a person injured on a boat could have had his case tried in a common law court to a jury if he wished; for under the judiciary act such rights are saved to suitors. But as it has been said it was the right to a trial in the common law court that is so saved and not a common law case that was created.

There is one other form of limitation of liability which applies to damage of cargo and is a matter of defense in the answer. But this is not part of what is commonly known as "Limitation of Liability."

This is but one of the many interesting branches of Admiralty with its tales of the seas.

It is to be regretted that just because the law of Admiralty does not seem to open a field for money-making to the average student, the universities should deny the students the benefit of the broadening culture derived from the study of this branch of the law. It is strange, too, that when the universities do add this branch of the law to their curriculum, they generally select someone to teach it who has never practiced it. There is no part of jurisprudence, if properly presented to a class, that would create so much interest and enthusiasm and would consequently have such a tendency to help students in all other branches of the law, as the study of Admiralty. It would take the students to every shore, get them interested in something beyond their state border line and make them feel that they were becoming a part of this law of nations which has helped to civilize the sea commerce of the world and has had much to do with the advancement and enlightenment of the peoples of the earth.

*James D. Dewell, Jr.*

## EXCLUSION OF JAPANESE CHILDREN FROM THE PUBLIC SCHOOLS OF SAN FRANCISCO.

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The recent action of the Board of Education of San Francisco in excluding Japanese children from the public schools for white children and requiring that if they attend public school at all it shall be the Oriental schools, has given rise to friction between the two countries. The Japanese consul in San Francisco protested against this action and the protest was brought to the attention of the government at Washington by Count Aoki, the Japanese ambassador. In order to determine whether or not the Japanese are warranted in protesting, it is necessary to examine the ground upon which their protest rests. They insist that the action deprives them of a right guaranteed in the treaty between the United States and Japan signed at Washington in November, 1894, and ratified in February, 1895. Article I of this treaty reads as follows:

The citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their persons and property. \* \* \* In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind; to the succession to personal estate by will or otherwise, and the disposal of property of any sort and in any manner whatsoever which they may lawfully acquire the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects, or citizens or subjects of the most favored nation.

In view of the provisions of this treaty, it is clear that the Japanese have a grievance. The subjects of Japan are discriminated against; for, although treated upon an equality with Chinese and Koreans they are denied privileges accorded to subjects of Great Britain, Germany, France, Italy, Russia, Austria, etc. Whether the privileges accorded them of attending the Oriental schools is a sufficient compensation for depriving them of the right to attend the American public schools, so that the grievance is a purely technical and not a substantial one, is a matter of which the United States is not the sole judge. We must concede to the Japanese equal rights with ourselves in judging of this matter. It is entirely clear that if

they wish their children to become Americans, the privilege of sending them to the public schools is one of inestimable value. It cannot have escaped the observant and quick-witted Japanese that our public school is the greatest institution on earth for making Americans; that but for it the millions of immigrants who have come to this country could never have been assimilated, but would have remained a foreign substance in the body politic and would gradually have changed the American people from a distinctive unified type to a most conglomerate mass of individuals.

To this it has been objected that the Japanese do not want to become and will not become Americans. Yet here again it will not do for us to constitute ourselves as judge and jury. We must concede to the Japanese some right to a hearing when determining the question of their intentions. As regards a matter of that sort their opinion should be allowed to count for something.

Except in those sections of the country whose race prejudice has dimmed the vision and dissipated the sense of fairness, it is admitted that during the life of the treaty of 1894 between the United States and Japan the latter is entitled to insist that its subjects shall not be discriminated against and that it is the duty of the United States to see that they are not. This in substance is admitted by the federal government. But here comes in an awkward provision in our system of government, a provision which, as usually interpreted, is not only awkward but ridiculous. I refer to the traditional conception of the distribution of powers between the state and federal governments. According to this the sphere within which a state is supposed to have exclusive jurisdiction is something so sacred that the mere fact that the federal government must assume responsibility for what is done, or for a failure to act, must not be thought of as giving it a right to interfere in order to protect its interests and its honor.

The present case is not the first in which adherence to the above theory has threatened international complications. It will be recalled that in 1851 a mob destroyed the building containing the Spanish consulate in New Orleans and looted several cigar stores owned by Spaniards. The United States acknowledged its responsibility for the damage done, apologized to the Spanish government and provided that the ship on which its consul should return should be saluted as a mark of respect. But it did not claim jurisdiction to punish the wrongdoers and thus discourage a similar outbreak in the future.

This act of the mob, although directed in part against the official

of a foreign government did not cause nearly so much friction as when in 1891 a mob broke into the jail in New Orleans and put to death three Italian subjects. Italy at once demanded assurance from the United States that the offenders would be punished and that an indemnity would be paid to the relatives of the victims. The United States replied by assuring the Italian government that it would "recompense every Italian subject who might be wronged by the violation of a treaty to which the faith of the United States is pledged," and that it would urge the state of Louisiana to see that justice was meted out to the offenders but claimed that it had no authority to institute proceedings against them itself and that hence it could not give to Italy assurance that proceedings would be instituted. Though Italy exhibited a lack of patience and self-control in withdrawing her minister as hastily as she did, there is considerable excuse for the complaint of that government uttered by her minister for foreign affairs, Rudini, that "We are under the sad necessity of concluding that what to every other government would be the accomplishment of simple duty is impossible to the federal government. We have affirmed, and we again affirm our right. Let the federal government reflect upon its side if it is expedient to leave to the mercy of each state of the Union, irresponsible to foreign countries, the efficiency of treaties pledging its faith and honor to entire nations." Such was the state of public opinion in New Orleans that the offenders were not brought to trial and though we escaped by the payment of an indemnity, the awkward and embarrassing position in which we were placed should have led us to seek a guarantee against a recurrence of the necessity for pleading a *non-possumus* when called upon to fulfil our treaty obligations.

In his message to Congress of December 9, 1891, President Harrison called the attention of Congress to the unfortunate affair in the following language: "Some suggestions growing out of the unhappy incident are worthy the attention of Congress. It would, I believe, be entirely competent for Congress to make offenses against the treaty rights of foreigners domiciled in the United States cognizable in the federal courts. This has not, however, been done, and the federal officers and courts have no power to intervene, either for the protection of a foreign citizen or for the punishment of his slayers. It seems to me to follow, in this state of the law, that the officers of the state charged with police and judicial powers in such cases must in the consideration of international questions growing out of such incidents be regarded in such sense

as federal agents as to make this government answerable for their acts in cases where it would be answerable if the United States had used its constitutional power to define and punish crime against treaty rights."

The present case does not involve a question of criminal jurisdiction, and so is not in all respects parallel to the New Orleans affair, but it does involve a matter in which the United States has by treaty made itself responsible for acts ordinarily regulated exclusively by the state. Though the Japanese are showing greater patience than did Italy, there is every reason to believe that they will show greater firmness. The Board of Education claims that its action is in accordance with the statutes of California and that it will not rescind its action unless compelled by the courts to do so. A test case is being brought for the purpose of testing the constitutionality of the statute. Section 2, Article VI, of the Constitution of the United States provides that "This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding." As the statute conflicts with the treaty of 1894, which was "made under the authority of the United States," it is unconstitutional and cannot give the Board of Education authority to take the action which it has taken under it. If, then, the state court does its duty, a solution for the difficulty can readily be found.

But suppose that the state court allows itself to be blinded by the race prejudice which influenced the legislature to pass the statute, the litigation can be prolonged to such a degree that the Japanese may readily conclude that we are not acting in good faith, for it is hardly fair to expect that the Japanese people will understand that our federal government which is entrusted with the making of treaties cannot also secure obedience to their provisions upon the part of its subordinate divisions.

Whether or not the present case is one which can be brought directly into the federal courts, with legislation by Congress providing therefor, is a question of jurisdiction which is as interesting as it is difficult, and will be reserved for discussion in a subsequent article.

*Edwin Maxey, LL.D.*

ALEXANDER HAMILTON.

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The concern of the American people in the national authority of our government, it may be safely said, is commensurate with the growth and expansion of the country itself. Certain manifestations of this power I have selected for your consideration. In this day when the president and Congress are daily discussing remedial measures involving its further and more effective extension, the topic, I trust, may seem timely and appropriate. Now how may we the more profitably contemplate our theme?

Some ten years ago, a renowned statesman, lawyer, and teacher, whose enduring fame will be connected ever with this great school, wrote me as follows: "Treatises in the way of commentary upon the Constitution, while sometimes very able and valuable, seem to me to be often too purely didactic and professional for the general reader or the young student. This," he continued, "I see is your own view of it to which I hope you will give full expression." The writer was the late Edward J. Phelps. Now that great teacher possibly had in mind a student body more immature, and therefore less proficient, than the young gentlemen whom I now have the happiness to address. But with liberal interpretation of his thought, to the students of a school he loved, I purpose, in the duty with which I have been honored by your great university, rather than abstract discussion, to present concrete illustration from the lives of certain illustrious Americans who were typical and swerveless advocates of the national principle in our system, and from the lives of others who with equal sincerity and devotedness resisted it to the end.

Of the formative period, such illustration may be found in a brief story of the accomplishments of Alexander Hamilton. In its inevitable exposition, the life-work of John Marshall affords another, full as it is felicitous. Among those who through motives and beliefs the most conscientious, the stars in their courses fought, may be found a graduate, in the forties of this school, the war governor of the most powerful of the Southern states throughout the trial of the Constitution by wager of battle, Joseph E. Brown of Georgia. Of those who sacrificed all, and with reluctance inde-

scribable, to the conception, that by revolution the state and not the nation became supreme, example most illustrious is found in the general-in-chief of the Confederate armies, Robert Edward Lee. In successive addresses I purpose to briefly speak of these exemplars of a noble and sacrificial past. In our own day and time, when the authority of the nation is in perfect flower, it is not difficult to find illustration of its potential beneficence, to country and to mankind, in the fearless utilization of its powers; in the practical and conceded achievements of our living president.

On the island of St. Nevis in the West Indies, the eleventh of January, 1757, Alexander Hamilton was born. Many great men have been precocious children. The astonishing precocity of Hamilton rivalled the growth of those tropical flowers perfuming the zephyrs that caressed the soft tresses of the little child. We find him when twelve years old a clerk in a counting-room, and in the familiar letter to his friend, Edward Stephens, at that tender age it is discovered that he is already the possessor of a vocabulary well nigh Johnsonian. "I contemn," he writes, "the grovelling condition of a clerk or the like to which my fortune condemns me, and would willingly risk my life though not my character, to exalt my station. I am confident, Ned, that my youth excludes me from any hopes of immediate preferment, nor do I desire it, but I mean to prepare the way for futurity." So marked was his capacity at this time, that by friends or relatives, he was entrusted with the sole management of a mercantile business of importance, and it cannot be doubted that the familiarity he thus acquired with business methods and accounting, had the most important influence, when it devolved upon him to organize the treasury, and to utilize the untouched resources of our country for the establishment of national credit. Indeed I have long been convinced that no single accomplishment is of more practical value to the lawyer or statesman than a precise knowledge of accounting and the methods of successful business men.

The genius of this remarkable youth was now appreciated by those who were concerned in his welfare. By a judicious liberality, for which they will deserve the gratitude of generations yet unborn, they made provision for his education. In his fifteenth year he left St. Nevis and arrived in Boston in October, 1772. He was advised to enter the grammar school at Elizabethtown, and at the end of the year he entered King's, now Columbia College. There he had the assistance of a private tutor. He labored incessantly. In addition to his regular studies he indulged his natural inclination and made



continual excursions into the domains of finance, government and politics.

Hamilton was born twelve years after Jefferson. Wellington and Napoleon were born in the same month. "Providence," said Louis the Eighteenth, "owed us that counterpoise."

While Hamilton was thus, in the words of his boyish letter, striving "to prepare for futurity," there came in his affairs that tide which leads on to fortune. It was the rising tide of the American Revolution.

The lad had been born in an English dependency. While it is probable that he had listened to the declamations of the Boston patriots, he was now in New York where the Tories were in control. It is characteristic of the man, as he declares himself, that he had formed strong prejudices on the ministerial side, until he became convinced by the superior force of the arguments in favor of the Colonial claims.

On the sixth of July, 1774, a great open air meeting was held under the auspices of the patriot leaders. Hamilton was in attendance listening to the speakers.

In the summer of the same year, perhaps in the same month, on the other side of the Atlantic, another youngster of Scottish blood clothed in the regimentals of the Scotts Royals strolled into the court at the assizes of a country town where Lord Mansfield was planter as these firm lips exclaimed "The liberties of the country are safe." Long Island, White Plains, Trenton, Princeton, Brandywine, Monmouth and other stricken fields where the red coats of King George and his own "ragged Continentals yielding not" had met in the shock of battle, were all now behind him. He was now at the fruition of his hopes, but to the last he maintained the intense, but calm intrepidity in hours of extremest moment which has ever marked our greatest military leaders. As Hamilton's command advanced, Washington had dismounted, and had taken his stand in the grand battery with Generals Knox and Lincoln and their staffs. As the columns swept on, he watched them through an embrasure. One of his aides suggested that his situation was very much exposed. "If you think so," he coldly replied, "you are at liberty to step back." A musket ball struck the cannon in the embrasure, rolled along it and fell at his feet. General Knox grasped his arm, "My dear General," exclaimed Knox, "we cannot spare you yet." "It is a spent ball," replied Washington quietly, "no harm is done". When all was over and the redoubts were taken,

he drew a long breath, turned to Knox and said, "The work is done and well done." Five days later the British army marched mournfully from their works with slow and solemn steps, and colors cased, their drums thumping out, and their fifes wailing an old time air, entitled "the world turned upside down," and grounded their arms. The country gave way to transports of joy. Lord George Germane was the first to carry the news to Lord North at his office in Downing street. And how did he take it, was inquired. The reply was, "as he would have taken a ball in the breast."

It is interesting to recall that at Yorktown Hamilton no longer belonged to Washington's military family. The incident which occasioned the separation had occurred on the 18th. day of the previous February. It is described by Hamilton himself in a letter to General Schuyler. "An unexpected change," writes Hamilton, "has taken place in my situation. I am no longer a member of the General's family. This information will surprise you, and the manner of the change will surprise you more. Two days ago the General and I passed each other on the stairs; he told me he wanted to speak to me. I answered I would wait on him immediately. I went below and delivered Mr. Tilghman a letter to be sent to the commissary, containing an order of a pressing and interesting nature, returning to the General I was stopped on the way by the Marquis de LaFayette, and we conversed maybe about a minute on a matter of business. He can testify how impatient I was to get back, and that I left him in a manner which, but for our intimacy would have been more than abrupt. Instead of finding the General, as is usual, in his room, I met him at the head of the stairs, where, accosting me in an angry tone, 'Colonel Hamilton,' said he, 'you have kept me waiting at the head of the stairs these ten minutes; I must tell you, sir, you treat me with disrespect.' I replied without petulancy, but with decision, 'I am not conscious of it, sir; but since you have thought it necessary to tell me so, we part.' 'Very well, sir,' said he, 'if it be your choice,' or something to this effect, and we separated. I sincerely believe my absence which did so much umbrage, did not last ten minutes."

The exquisite judgement and profound magnanimity of Washington, was not ruffled by the punctilios of his young friend. We have seen how just he was to Hamilton at Yorktown. It is indeed probable that no man has ever surpassed Hamilton in his power to gain the affectionate donation of very

great men. "He was evidently," said one of his most engaging biographers, "very attractive and must have possessed a great charm of manners, address and conversation, but the real secret was that he loved his friends and so they loved him. All his comrades on the staff and all the officers young and old who knew him and were not hostile to Washington loved him and were proud of his talents. The same was true of the young French officers with whom he was much thrown, on account of his perfect command of their language, a very rare accomplishment in the colonies. To these attributes we may ascribe, that personal following in after years which for culture, force of character, lofty ability and devotion to his leadership, are surely unsurpassed in American political history.

It is incontestable, that in the practical application of the science of government, the educative results of Hamilton's duties as military secretary were most potential. His persuasive and constructive powers were now to be devoted for years to the salvation of an unorganized people, and the making of a nation. That Washington is himself entitled to the credit of the enormous correspondence which had emanated from his headquarters cannot be fairly denied. It was he who directed the movements of armies, who protested against the incapacity of officers, native and alien, who imparted to Congress an account of his necessities and who as unceasingly urged upon that body the performance of the duty. Indeed to the Continental Army, as to the continental congress, Washington's relation, when contrasted with that of other great Generals in command, is at once isolated and unique.

A Caesar might rely with confidence upon those legions the thunder of whose tread was heard from the plains of Parthia, to the mists of Caledonia. Cromwell, from a devout God-fearing and tyrant-hating people, had trained an army whose backs the brilliant Macaulay declares "no foeman had ever seen." These were at the command of that imperial voice whose mandate at once arrested the depredations of the Lpbian pirates and quenched the avenging fires of Rome. The great Frederick might with ostentation coin the silver chandeliers in his palaces in Berlin and Potsdam, but the last thaler of a united, devoted and warlike people was at the command of the last of the great Kings. At Austerlitz or Jena the undiminished enthusiasm of the French Revolution, the passion for military glory of the French people, and the wealth of the Empire, were instantly responsive to Napoleon's order or decree. Behind the armies of

Wellington were he constantly increasing wealth, and irresistible sea power of British people. On his lines at Torres Vardas, or his formation at Salamanca the cartridge boxes of his troops might be refilled and their rations supplied as regularly as at London or Chatham. Of these essentials of successful war, Washington had little or nothing. Indeed nearly to the end, the war of the revolution was fought without organized government of any sort, and it was soon seen that the compact that followed was worse than no government at all.

After Yorktown, our government was at the period of its greatest debility. We were now living under the Articles of Confederation, which had gone into alleged operation on the 1st of March, 1781. Both Hamilton and Washington had foreseen its impotency. In his famous letter to Duane, written the previous year, Hamilton had declared of this "firm league of friendship," as it was self described: "It is defective and requires to be altered." After this moderate criticism he adds: "It is neither fit for war nor peace. The idea of an uncontrollable sovereignty in each state will defeat the powers given to Congress and make our Union feeble and precarious." The unbroken testimony of men who lived in that day verifies the forecast of Washington's marvelous aide de camp. After six years experience of this "uncontrollable state sovereignty," a writer in the American Museum records: "The United States in Congress have exclusive power for the following purposes without being able to execute any of them. They make and conclude treaties, but can only recommend the observance of them. They appoint ambassadors, but cannot defray even the expense of their tables. They may borrow money in their own name on the faith of the Union, but cannot pay a dollar. They may coin money, but they cannot purchase an ounce of bullion. They may make war and determine what number of troops are necessary, but cannot raise a single soldier. In short they may declare everything but do nothing."

I may add that the United States of America during this period had no executive, and barring a "Prize Court of Appeal" as it was termed which had no power or process to enforce its decrees, no judiciary, and not a dollar to pay a judge or juror. Finally the sole tribunal representing the judiciary of the United States informed the moribund congress, that its duties were completed, and the court might as well dissolve. How far this report was ascribable to the fact that no sustentation was afforded

the judges from the empty coffers of the Confederation, we have no precise information. The Congress, however, promptly replied to the effect that the public interests required that the judges should retain their jurisdiction and exercise their authority, but without any salaries. With amiable self abnegation the judges then withdrew their resignation and we may trust continued to survive. Perhaps Thomas Jefferson had this precedent in mind, when some years later he declared of the Federal judges that "few die and none resign."

The debility of the government was daily more alarming. Finally the Congress of the Confederation which had at least on one occasion depended upon the sprinting excellence of its membership to escape personal chastisement at the hands of unpaid and mutinous troops, deemed it the part of discretion to silently and informally disband. The French minister now wrote to his government: "There is now in America no general government, neither President nor head of any one administrative department." In the meantime Washington had performed his last public act under the Revolutionary government. This was his formal resignation as commander in chief of the American army. He bade farewell to his troops, broke up their encampment at Newburgh on the Hudson. He had, on the eighth anniversary of the Lexington fight, announced to his army the joyful prospect of a certain peace. It was now November. He had been concerned for several days with the British evacuation of New York, and at a tavern near Whitehall Ferry he gave an affectionate farewell to his officers, grasping each silently by the hand. It was not until the twenty-third day of December that his resignation was delivered to Congress, and Mifflin, the president of Congress, as he received the parchment, exclaimed: "You retire from the theatre of action with the blessings of your fellow citizens, but the glory of your virtues will not terminate with your military command; it will continue to animate remotest ages." The great man now retired to that colonial home on the romantic eminence, where the placid tides of the Potomac lave its Virginian shore, hard by the spot where his ashes now repose, forever to be hallowed by the love and devotion of increasing millions of his grateful countrymen. But the charms of Mt. Vernon could not banish from the mind of Washington the urgent necessities of his country. He saw John Adams, our first minister to the court of St. James, welcomed indeed by his first visitor, the noble and venerable Oglethorpe, the founder of my own state, but treated

with surly and contemptuous indifference by the King, who publicly turned his back, and by the British ministry, who sent no ambassador in return. He knew that when the American commissioners attempted to negotiate a commercial treaty with Great Britain, they were contemptuously asked whether they had credentials from the separate States. He knew that the public debt could not be funded; that the interest could not be met; that no taxes could be collected; that if there should be an attempt to coerce a state to pay its assessment, it meant inevitable, civil war and disintegration; that the best securities of the country rated at times as low as 15%; that at home and abroad our country was becoming disreputable; that Great Britain yet refused to surrender her Western posts, confessedly within the boundaries fixed by the treaty of peace; that Spain who for long thwarted the recognition of our independence, and ever the insidious enemy of America, holding the mouth of the Mississippi, was striving to withdraw the allegiance of our people west of the Alleghanies; that the Atlantic coast from the Bay of Fundy to the river St. Mary was cut up between thirteen independent states, each with its own revenue laws and collection methods; that interstate tariffs were alienating the American commonwealths, and that Connecticut taxed Massachusetts imports higher than British. The general heard the complaints of his intrepid comrades, who had faltered not amid the floating ice of the Delaware, the Hessian volleys at Trenton, the agonies of cold and hunger at Valley Forge, the sweltering heat of Monmouth, who at last had stormed the British entrenchments at Yorktown, and now without pay or pension had repaired to homes of penury and distress. Is it surprising, then, that the Father of his Country, and many who thought with him, determined that America should have a government worthy of the glories of its past, commensurate with the necessities of the hour, and sufficient for the exigencies of the future,

In the meantime, after Yorktown, Hamilton had resigned his commission and had left the army to take up the study of the law. More than a year before Yorktown, he had written to a member of Congress from New York, "We must at all events have a vigorous confederation, if we mean to succeed in the contest and be happy thereafter. Internal policies should be regulated by the legislatures. Congress should have complete sovereignty in all that relates to war, peace, trade, finance, foreign affairs, armies, fleets, fortifications, coining money, estab-

lishing banks, imposing a land tax, poll tax, duties on trade and the unoccupied lands." The foreknowledge of the evolution of our government by the young staff officer will seem to rival prophecy itself. This remarkable letter was written from his tent while the writer was surrounded by the ragged and hungry soldiers of Washington. From the same environment he wrote to Robert Morris discussing his scheme for a national bank. These incidents exhibit at once his indomitable love of work, and his irresistible disposition toward broad concerns of state craft and national polity.

I have inexcusably omitted to mention that we find in Hamilton's life confirmation strong of that popular conviction, especially among the better half of humanity, that the greatest men are the most susceptible to the influence of feminine charms. When in 1779, Washington after Saratoga had sent his young officer to request re-enforcements from General Horatio Gates, Hamilton had met at Albany an apparition altogether more agreeable than that doughty and self-satisfied warrior. This was Miss Elizabeth Schuyler. This charming young woman was the daughter of the friend of Washington, the distinguished General of that name. The acquaintance was renewed in the Spring of 1780, and ripened into an engagement. The marriage was not unreasonably delayed. Hamilton was now connected with one of those famous Dutch families, of a race whose indomitable courage at once reclaimed their beloved Fatherland from the waves of the North Sea, and whose irresistible passion for civil and religious liberty had expelled from its borders the rule of merciless and intolerant bigots of a cruel and alien race. Our country owes much to the fighting strain of those brave Hollanders, and will doubtless continue, for some time to come, to profit from their passion for practical and effective state craft and their native instinct for the construction of works of irrigation, and the excavation of canals.

After a few months preparation, Hamilton was admitted to the bar in the Summer of 1782. Of course he had little time for study, but in after years it was found that all the law he had acquired, had been condensed in a brief manual in manuscript, which became serviceable to many others who did not possess his original powers of logic and reasoning.

It does not appear that his profession was immediately very productive. He had indeed the habit of charging very small fees. He was soon appointed receiver of continental taxes for

the state of New York, and November 1782, was elected to the decrepit Congress. At once, but with little hope, he grappled with the desperate condition of affairs. In vain did he attempt to secure legislation for duties on imports. In vain he struggled to prevent the disbandment of that gallant army described by La Fayette as the most patient to be found in the world. The pageant of state sovereignty sent them home with nothing but their rifles and muskets. In vain he urged the organization of a regular force which might become the nucleus of future armies. When State sovereignty was through with the national defense the army of the United States was found to consist of eighty mercenaries.

It is not then surprising that Hamilton's disposition toward forceful and effective organic law was immensely strengthened. The inanition and imbecility of scarecrow government, tolerated by the selfishness, suspicion, and inertia of thirteen unconnected states, drove him to the side of Washington, as faithful, as devoted, and as indomitable as at Valley Forge and Trenton, at Monmouth and Yorktown.

Now for the first time he takes active part in the formation of the Constitution. Seizing the occasion of the abortive convention at Annapolis he drafts an appeal for a new convention which throughout the country is read everywhere. Securing an election to the legislature of New York, with the utmost difficulty he induces the election of delegates to the Constitutional Convention of May 8, 1787. In that body he is the minority delegate from his state. There he contents himself with one great speech, which Gouverneur Morris declared the ablest and most impressive he ever heard. The synopsis of this great argument is preserved, and it sets forth those profound meditations upon the science of government, which have been to him habitual from boyhood itself. In favor of strong government, it is far in advance of the views of the Convention but it is, as it is intended to be, highly educative. Certain of its principles while startling to the Convention then, to the American people of today are as familiar as household words. His colleagues saturated with opposition leaving the Convention he does not hesitate to sign the constitution for New York.

To frame the Constitution was a difficult task, but to secure its adoption by the people is more difficult still. The story is familiar how he and Madison and Jay devote their facile and lucid pens, their exquisite powers of argument and organization



to the cause of the perpetual union. Of Hamilton and Madison, who has been termed the Father of the Constitution, it has been said that "the complement of two such minds was most auspicious for the country." They are both very young for such a mighty undertaking, but the serene wisdom of Washington, the silent watchman, curbs the fervid energy of the one and encourages the dispassionate clear-sighted and persuasive powers of the other. In successive numbers the *Federalist* is published. Aside from the great decisions of John Marshall and the mighty judges who held with him, to this day it is the best and most satisfactory exposition of the mischiefs the Constitution was intended to cure, the elastic and all sufficient remedies which it affords. Nor is it without the proud elation of Americanism we reflect that when the victorious Princes of the great Teutonic race intent on the formation of the German empire assembled in the Hall of Mirrors at Versailles, to the *Federalist* their jurisconsults turned, as to the most comprehensive treatise on the principles of federal government.

But the literary rank attained by Hamilton in these great papers, great as they were, do not afford such manifestation of astonishing power, as his part in the debate in the New York convention. Here the opponents of the Constitution under the leadership of Clinton, Governor of the State, have forty-six out of sixty-five votes. The majority is lead by Melancthon Smith, no mean debater himself. There also are Yates and Lansing, who had been Hamilton's colleagues in the Constitutional Convention. The minority of nineteen had for its leaders, Hamilton, Livingston and Jay. "Two-thirds of the convention and four-sevenths of the people are against us," Hamilton declares.

The work of the convention and every clause and paragraph of the Constitution is scrutinized and assailed with all the bitterness a venomous and hypercritical majority can suggest. Hamilton himself is constantly assailed, as if he, and not the Constitution is the object of attack. The sessions of the Constitutional Convention had been secret, and Hamilton is familiar with every detail. He comes to the debate as from a rehearsal. When it is all over it is again seen, in the words of Washington at Yorktown, that "the work is done and well done." The opponents of the Constitution dare not come to a direct vote. This suits the *Federalists*, who know that time is working for them. Nine states have ratified, and presently the news comes that the Old Dominion, the state of Washington, had also assented. Perceiv-

ing their defeat the opponents propose a long string of amendments and a conditional ratification. So brilliant is the reply of Hamilton to these measures, that Melancthon Smith himself confesses that conditional ratification is absurd, and then admits that he has been convinced by Hamilton and that he will vote for the Constitution. The Constitution has won.

This victory of Hamilton was epochal. As a parliamentary victory it has rarely been equalled. In open debate upon clearly marked party lines he has overcome and won over a hostile majority. Mr. Bancroft declares that as a debater he was the superior of William Pitt, the famous son of that more famous Pitt, the Earl of Chatham. We may well believe that he had little, if any, familiarity with the masterpieces of Greek and Roman, which afforded an incomparable training and equipment, to such men as Pitt and Fox, Macaulay and Gladstone. Nor did he possess the musical and irresistible eloquence found in the native wood notes wild of Patrick Henry. It could not be said of him as Grattan said of Chatham that he "resembled sometimes the thunder and sometimes the music of the spheres," but in crystal clearness he was unsurpassed. No man could misunderstand his meaning, and behind this there were qualities which touched the deepest springs of the human heart. Many eye witnesses testified that Hamilton moved his audience to tears. It was the passionate fervor of his convictions, the profound consciousness of his audience, that he paid them the high tribute of an appeal to the deepest and purest sources of their patriotism. Reasonable differences he dispelled by the illuminative processes of his mind. Immovable hostility he destroyed by the concentrated flame of reason's whitest heat.

When the new government is formed and the department is created, he is at once appointed by Washington as the first Secretary of the Treasury. In ten days he is directed by the new Congress to prepare and report upon the public credit. That this involves his whole financial policy, does not prevent that body from requesting him to report also full details for the raising, management and collection of the revenue, for revenue cutters, for estimates of income and expenditure, for the temporary regulation of the currency, for navigation laws and the regulation of the coasting trade, for the proper management of the public lands, upon all claims against the government, and for the purchase of West Point. With the utmost celerity the

young Secretary disposes of all these matters, and in addition voluntarily suggests a scheme for a judicial system.

He obtains money for the immediate necessities of the government, sometimes pledging his own credit, and then devises the vast financial machinery of the Treasury Department and the system of accounting which in efficient principle survives to the present time.

The ineffaceable impression he makes is in the early days of our legislative history. In his first great report on the public credit he announces principles, which when observed have been rewarded with a national prosperity such as the world has never known, but when, for the hour, avoided, the punishment as swiftly comes in bankruptcy, disaster, panic and dismay. His entire system is based upon the most scrupulous unvarying honor in the discharge of national obligations. In his own language he expresses it all, "to justify and preserve the confidence of the most enlightened friends of good government; to promote the increasing respectability of the American name; to answer the calls of justice; to restore landed property to its due value; to cement more closely the union of the states; to add to their security against foreign attack; to establish public order on the basis of an upright and liberal policy; these are the great and invaluable ends to be secured by a proper and adequate provision  
\* \* \* for the support of public credit."

It is obviously impossible upon an occasion like this to discuss even the principal topics of those momentous concerns, to which Hamilton's original and constructive powers were successively devoted. It will suffice to say that his report on manufactures is the first, and by many believed to be the greatest argument ever made in maintenance of the principle and the wisdom of protection of the manufactured products of the American people against injurious competition from other lands. It was instantly declared by Jefferson, his great rival to be designed "to grasp for Congress control of all matters which they should deem for the public welfare and which were susceptible of the application of money." His second report urging the establishment of an excise tax is the basis of the internal revenue system. As Farraday said that "electricity is Franklin," so we may say that national banking system is Hamilton. His great argument on a national bank evoking for the first time the implied powers of the Constitution, hurriedly prepared amid the multitudinous and laborious duties of his station, will ever cause

men to accord to him, among his other amazing powers, a high place in the front rank of the profession of the law. Here for the first time is discovered the clear, but seemingly unfathomed, depths of that well-spring of national authority, which has sustained the purposes of the nation to enact any and all laws, which may at home, at once make effective the letter of the organic law, and advance the welfare of the American people, and abroad to give to the just, righteous and beneficial conclusions of American civilization, expressed by American administration, supported by the moral, and if need be the physical influence of the great republic, the force and effect of international law.

It is true that this doctrine of Hamilton and his followers, to use the simile of John Adams on another portentous occasion, was "like a fire bell in the night." To write the history of the resulting struggles over this basic principle of the national existence, as parties reeled and staggered in the conflicts of the forum or in the deadlier conflicts of the field, would be to write the history of the country since that time; but that Hamilton was right and eternally right will no longer admit of serious discussion. To deny it would be to sweep from the statute books the entire criminal jurisdiction of the United States courts. Blot from the American system the Hamiltonian doctrine of the implied powers and the fame of our jurisprudence would wither and perish like the prophet's gourdmen. The public buildings which house our officials and protect our records, the forts and batteries on our boundaries, the friendly lights which guide the mariner, the granitic walls of the great locks on the great lakes through whose portals float in safety a tonnage greater and more profitable than that which rides over the waves of the ocean, the stupendous works at the mouth of the Mississippi, the incessant clanking of those gigantic engines now cutting an inter-oceanic path for the maritime commerce of the world, these and much more like these would be but the successive monuments of an usurping government and a lawless and therefore a decadent people. Whether it be for an appropriation to maintain a range light, or to relieve the agonized people of a city whose homes have crumbled by the upheaval of the earthquake, the horrid sweep of the conflagration, all is traceable to that source of governmental authority forever residing in the implied powers of the Constitution. Hamilton had seen and known the condition of our country when it seemed in the language of Washington, that it would resolve itself into the "withered fragments of empire."

With his illustrious compatriots, he educated Patrick Henry's three millions armed in the holy cause of liberty, and their children, to the knowledge that all liberty is worthless save liberty under the law and effective law. He now saw the roseate blush of the nation's dawn. It enchanted his prescient and prophetic vision. Well might he have exclaimed as did another patriot, when the shot of the embattled farmers rang out on that memorable April dawn so many years before, "Oh, what a glorious morning is this !"

But, alas, that

"Base Envy that withers at another's joy,  
And hates that excellence it cannot reach,"

should so soon mark him for its own.

For two years more than a century the mortal remains of this great man have rested in the churchyard of old Trinity. Millions of his countrymen, on crowded Broadway annually pass in a few feet of the spot where his ashes repose. The small city where he labored, and lived, and died, has become one of the greatest on earth. Gigantic structures devoted to the trade, commerce, transportation and banking of the world, to which his genius imparted so much, tower above the graceful spires of the old church and cast their shadows over the sward where the forefathers of the city, and of the nation sleep. Across the way in a short and narrow street the wealth of this and other nations is concentrated for the service and for the advancement of every interest of a mighty people. The rains laden with their human freight, thunder hard by the lonely grave, or rumble in subways far beneath its level. The beautiful river across which so many years ago he went to meet his mortal enemy, and his fate, sends forth year after year bread to feed nations, whose names the sleeper never heard, the manufactured necessities of life, of which the sleeper never dreamed. Not inappropriate then is his resting place. Yet magnificent as are the environments of his grave, to this man who "thought continually" there may be a vision nobler by far. It is the happy homes of eighty millions of American people, a people whose domain stretches from the tropical frondage of Porto Rico to Alaska's frozen strand; from the gigantic shores of Maine, to that wondrous archipelago of the Orient, where but lately the guns of our gallant squadron proclaimed that the genius of American civilization had come to stay. And if, as we fondly trust, the souls of those we love, who precede us, are permitted to receive and to know those who

follow, may it not be true after all of life was over, that comrade compatriot he heard, as at Yorktown, the majestic words, "The work is done and well done," from the welcoming voice of the Father of his Country.

*Emory Speer, LL.D.*

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The advocacy of National authority, apparent in the lectures on the Storr's foundation for this year, is possibly native with the lecturer, Judge Emory Speer of Georgia, whose address on "Hamilton" we publish in this number, and whose address on "The Initiative of the President" appeared in the November issue. He is a native Georgian, the grandson of Alexander Speer, one of the most eloquent and forceful leaders of the Union party in South Carolina in the days of Nullification, and the son of the Reverend Eustace W. Speer, D.D., an eminent divine of the M. E. Church South, who was equally well known for his opposition to the disruption of the Union.

Judge Speer, while only fifty-eight years of age, has been in public service for more than a generation. He was appointed Solicitor-General, the state prosecuting attorney, in January, 1873. He was elected to Congress in 1878, and was one of the very few members of that body who were, since the organization of the government, appointed to the Ways and Means Committee in their second Congressional term. At the expiration of that term, he was immediately appointed by President Arthur, United States attorney for the Northern District of Georgia. His career in that station was marked by several notable professional victories. Perhaps the most significant of these was his success in the *United States v. Yarbrough* and others, a prosecution for conspiracy, reported in *ex parte Yarbrough*, 110 U. S. 651. This is the leading case on that topic, where the conspiracy is formed to injure another, because of his exercise of a right secured to him by the constitution and laws of the United States. After less than two years' service in that station, Judge Speer was appointed to the position he now holds, that of United States District Judge for the Southern District of Georgia. For nearly twenty-two years he has performed all of the duties of Judge in the District Court, and practically all of the duties in the Circuit Court, not Appellate, in the extensive and populous territory within the jurisdiction of his district. So steady and unwavering is the support given his administration of the law by the people of that typically Southern country, that the laws of the government are enforced and the rights of non-residents protected there with unvarying effectiveness and certainty.

Like many of our judges, he finds time to aid young men in preparation for admission to the bar, and is dean of the faculty of one of the most prosperous law schools in the South, that of Mercer University, located at Macon, where Judge Speer resides.

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At a meeting of the class of '99 Law School held yesterday, the following preamble and resolutions regarding Judge Ullman's death were adopted:

*Whereas*, We have learned with deep sorrow of the death of our beloved classmate, Jacob B. Ullman; and

*Whereas*, We wish to express in permanent form our appreciation of his sterling worth, his high attainments, his genial and lovable character, which has been manifested in the high station to which he was called and which has endeared him to us and all who knew him:

*Resolved*, That we tender to his family our most sincere sympathy in their bereavement; and be it further

*Resolved*, That a copy of these resolutions be sent to his family and that they be published in the New Haven papers, YALE LAW JOURNAL and *Yale Alumni Weekly*.

On behalf of the class '99 Yale Law School.

HARRISON HEWITT,  
ERNEST C. SIMPSON, } *Committee.*  
SAMUEL E. HOYT,

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*Whereas*, It has pleased Almighty God, in his infinite and unsearchable wisdom to remove from our midst the Honorable Jacob Bertram Ullman; and,

Whereas, We, the members of the Yale Kent Club, realizing the great loss of a true friend and loyal supporter,

*Be it resolved*, That we wish to express our sorrow at the unexpected death of our former friend and member; and that we desire to extend our sincere sympathy to his family in their bereavement;

*And be it further resolved*, That a copy of these resolutions be sent to his family; and that a copy be published in THE YALE LAW JOURNAL.

JOHN B. DILLON,  
WILLIAM J. MCKENNA, } Committee for the  
JOSEPH G. SHAPIRO. } Yale Kent Club.

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## THE ORDINARY AND THE ULTIMATE PURCHASER.

In cases of unfair competition the court acts on the ground that the defendant's wrongful conduct will be detrimental to another tradesman, because it is calculated to deceive, or has deceived, persons who desire to purchase the goods of one maker or character, by substituting those of another maker or character. It is, therefore, important to have a standard as to the persons whose deception is sufficient to induce the law to intervene at the instance of the trader who complains of another's wrongful act. This standard has been fixed and the persons likely to be deceived, in order that the courts may act have been held to be the "ordinary purchasers,"<sup>1</sup> "persons of ordinary caution and prudence,"<sup>2</sup> the "ordinary run of persons,"<sup>3</sup> purchasers "of average or of ordinary intelligence using

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1. *McCall v. Theal*, 28 Gr. U. C. Ch. 48; *Wheeler v. Johnston*, 13 Ir. L. T. R. 87; *Cal. Fig Syrup Co. v. Worden*, 95 Fed. 132; *Cal. Fig Syrup Co. v. Putnam*, 66 Fed. 750; *Kann v. Dramond Steel Co.*, 89 Fed. 706; *Grossmith, ex parte*, 100 Off. Gaz. 2175; *McLean v. Fleming*, 96 U. S. 245; *Monopol Tob Works v. Gensior*, 66 N. Y. Supp. 155; *Boston Rubber Co. v. Roston Rubber Co.*, 32 Can. S. C. R. 315; *Robinson v. Storm*, 52 S. W. 880; *New Home Co. v. Bloomingdale*, 59 Fed. 284; *Estes v. Belford*, 30 Off. Gaz. 99; *Allegretti v.* 100 Off. Gaz. 2175; *McLean v. Fleming*, 96 U. S. 245; *Monopol Tob Works v. Gensior*, 66 N. Y. Supp. 155; *Boston Rubber Co. v. Boston Rubber Co.*, 32 Can. S. C. R. 315; *Robinson v. Storm*, 52 S. W. 880; *New Home Co. v. Bloomingdale*, 59 Fed. 284; *Estes v. Belford*, 30 Off. Gaz. 99; *Allegretti v. Rubel*, 86 Ill. App. 600; *Conrad v. Uhrig*, 8 Mo. App. 277; *Shaw Co. v. Mack*, 12 Fed. 707; *Avery v. Meikle (Ky.)*, 27 Off. Gaz. 1027; *Globe Co. v. Brown*, 121 Fed. 90; *Parlett v. Gugenheimer*, 67 Md. 542; *Crawshay v. Thompson*, 4 Man & Gr. 357; *Morse v. Martin*, Can. Sup. Ct. Dig. 1875 to 93, p. 839; *Blackwell v. Armisted*, Fed. Cas. 1474; *Hostetter v. Vowinkle*, Fed. Cas. 6714; *Con. Fruit Jar Co. v. Thomas*, Fed. Cas. 3131; *Caire ex parte*, 15 Off. Gaz. 248; *Elgin Co. v. Illinois Co.*, 89 Fed. 487; *Columbia Mill Co. v. Alcorn*, 65 Off. Gaz. 1916; *Southern White Lead Co. v. Carey*, 33 Off. Gaz. 624, 39 Fed. 492; *Tuerk v. Tuerk*, 76 Off. Gaz. (N. Y.) 1274.

2. *Hildreth v. McDonald*, 164 Mass. 16; *Ft. Stanwix Co. v. McKinley Co.*, 63 N. Y. Supp. 704; *Leidersdorf v. Flint*, 50 Wis. 401.

3. *Croft v. Day*, 7 Beav. 84.

ordinary care,"<sup>4</sup> men who were "in the ordinary course of purchasing,"<sup>5</sup> "ordinary purchasers exercising the ordinary degree of caution,"<sup>6</sup> buyers who exercise the usual amount of prudence and caution,<sup>7</sup> persons in the ordinary course of purchasing goods,<sup>8</sup> persons who used ordinary precaution,<sup>9</sup> the purchasing public,<sup>10</sup> the general purchaser,<sup>11</sup> the ordinary observer,<sup>12</sup> the ordinary mass of purchasers,<sup>13</sup> persons of ordinary discernment,<sup>14</sup> or the sensible purchasers.<sup>15</sup> These numerous expressions show that the courts do not demand a degree of similarity which would deceive experts, or those giving close examination,<sup>16</sup> but such as would deceive the ordinary person, forming a part of the "unsuspecting public,"<sup>17</sup> buying on "casual sight" of the goods.<sup>18</sup>

Where ordinary attention will enable any one of common sense or average intelligence to discriminate between the two articles,

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4. *Welsbach Light Co. v. Adam*, 107 Fed. 463; *Harper v. Lare*, 103 Fed. 203; *Fischer v. Blanch*, 138 N. Y. 244; *Radam v. Capitol Co.*, 81 Tex. 122; *Enterprise Co. v. Landers* 125 Fed.; *Keuffel v. Crocker*, 118 Fed. 187; *Singer v. Charlebois*, 16 Quebec, S. C. 169.

5. *Liggett v. Sam Reid Co.*, 104 Mo. 53; *Consolidated Co. v. Thomas*, Dig. 665; *Barnard v. Pillow*, 1868 W. N. 94; *Seixo v. Provesende*, 12 L. R. Ch. Ap. 192; *Jerome v. Johnson*, 59 N. Y. Supp. 859; *Reeder v. Brodt*, 6 Ohio Dec. 248; *Robertson v. Berry*, 50 Md. 591, 597; *Schmidt v. Brieg*, 100 Cal. 672; *Mumm v. Wittemann*, 95 Fed. 966, 91 Fed. 126; *Hostetter v. Adams*, 10 Fed. 838; *Champion v. Smith*, 21 N. S. W. R. Eq. 110; *Anheuser Busch v. Clarke*, 34 Off. Gaz. 562; *Solio Co. v. Pozo*, 16 Cal. 388; *Soda Foam B. P. Co., ex parte*, 96 Off. Gaz. 1239.

6. *Liebig Co. v. Walker*, 115 Fed. 822; *Van Hoboken v. Mokus*, 112 Fed. 528; *Nat. Biscuit Co. v. Swick*, 121 Fed. 1007; *Sterling Co. v. Eureka Co.*, 70 Fed. 704, 80 Fed. 105; *Enterprise Co. v. Landers*, 125 Fed.

7. *Colladay v. Baird*, 14 Phil. 139.

8. *Ball v. Siegel*, 116 Ill. 137.

9. *Farrow Re.*, 7 R. P. C. 260; *Peterson v. Humphrey*, 4 Abb. Pr. N. S. 394.

10. *Aspegren, ex parte*, 100 Off. Gaz. 684.

11. *Neva Stearine Co. v. Mowling*, 9 V. L. R. E. 98, 104; *Postum Co. v. Am. Health Co.*, 109 Fed. 898.

12. *Sterling Remedy Co. v. Corey*, 110 Fed. 372.

13. *Blackwell v. Wright*, 73 N. C. 310.

14. *Imbs, ex parte*, 10 Off. Gaz. 463; *Cf. Anglo Swiss Co. v. Swiss Co.*, 1871 W. N. 163.

15. *Liebig v. Anderson*, 1882 W. N. 147.

16. *Wamsutta Co. v. Allen*, 12 Phila. 535; *Kirker v. Mayman*, 1 Aust St. R. Eq. 73; *Witthaus v. Wallace*, 2 W. N. C. 610; *Royal Co. v. Royal*, 122 Fed. 337; *Lawrence v. Lowell*, 129 Mass. 455; *Allegretti v. Rubel*, 86 Ill. App. 600; *Hennesy v. Hogan*, 6 W. W. & A. B. 225.

17. *Metcalfe v. Brand*, 86 Ky. 331; *Wylam v. Clarke*, 1876 W. N. 68.

18. *Clinton Co. v. N. Y. Co.*, 50 N. Y. Supp. 437.

there is of course no remedy<sup>19</sup> and the case is the strongest possible for the defendant when the "casual observer" would not be deceived.<sup>20</sup> The resemblance must be such as would deceive a person making the "ordinary and natural use of his senses"<sup>21</sup> and "possessed of sufficient amount of intelligence to note the difference the senses convey, neither very clever nor a fool."<sup>22</sup> If the name or dress of the defendant's article tends to mislead the most cautious purchaser, *a fortiori*, the defendant will be enjoined.<sup>23</sup> Persons of skill and intelligence, who gave heed to the matter might incur no risk of error, but the law considers not them but rather the general public which has not been forewarned of the danger of deception.<sup>24</sup> Relief is given against such conduct by a tradesman, as would deceive anyone "not thoroughly acquainted" with the two articles.<sup>25</sup> It is not expected that the ordinary purchaser possesses the knowledge of a manufacturer of the goods,<sup>26</sup> nor that he has either time or ability to note detailed variance of the articles.<sup>27</sup> By application of the same test, registration of an alleged trademark may be refused.<sup>28</sup>

It has been held that an equity court will issue an injunction, if any class of purchasers or any considerable number of a class are misled.<sup>29</sup>

In applying the ordinary purchaser test, "we must not lose sight of the character of the article, the use to which it is put, the kind of people who ask for it, and the manner in which they usually order it" and<sup>30</sup> we must ask whether the "ordinary mass of purchasers,

19. *Elgin Butter Co. v. Elgin Creamery Co.*, 155 Ill. 127; *Brennan v. Emery Co.*, 99 Fed. 971; *Hygeia Co. v. Hygeia Co.*, 140 N. Y. 94; *Partridge v. Menck*, 2 Sandf. Ch. 622; *Wostenholme v. Woolhouse*, 14 V. L. R. 963; *Ball v. Siegel*, 116 Ill. 137; *U. S. v. Roche*, 1 McCreary 385.

20. *Radam v. Capitol Co.*, 81 Tex. 122.

21. *Munro v. Tracy*, 129 N. Y. 38; *De Long v. De Long*, 74 Off. Gaz. 809 (N. Y.).

22. *Clark v. Sharp*, 15 R. P. C., 141, 268.

23. *Wolfe v. Alsop*, 12 V. L. R., 421; *Cuervo v. Henkell*, 60 Off. Gaz. 440.

24. *Rose v. McLean*, 24 Ont. A. R. 240; *Dunn Re*, 7 R. P. C. 311; *Smith v. Carron*, 13 R. P. C. 108; *Welsbach Light Co. v. Adam*, 107 Fed. 463.

25. *Canada Pub. Co. v. Gage*, 11 Can. S. C. R. 306.

26. *Shrimpton v. Laight*, 18 Beav. 164.

27. *Partridge v. Menck*, 2 Sandf. Ch. 622; *Edge v. Harrison*, 8 R. P. C. 74; *Draper v. Skerrett*, 94 Fed. 912.

28. *Marks Re.*, 63 L. J. Ch. 234.

29. *Davis v. Kennedy*, 13 Gr. U. C. Ch. 523; *Rose v. McLean*, 24 Ont. A. R. 240; *Wolfe v. Alsop*, 12 V. L. R. 421.

30. *Liggett v. Hynes*, 28 Off. Gaz. 809.

paying the usual attention in buying the article in question," would be deceived.<sup>31</sup> Relief should be given the plaintiff, when the defendant's conduct is calculated to deceive an ordinary buyer making a purchase under the ordinary conditions which prevail in the conduct of the particular traffic to which the controversy relates.<sup>32</sup> The age, ignorance, or lack of acquaintance with a foreign tongue on the part of the ordinary purchasers may be an important consideration and it is of little importance whether judge or jury would be deceived.<sup>33</sup>

So, too, the facts will be taken note of as matters of common knowledge that packages were handed buyers wrapped up in paper and with no opportunity of examining the contents,<sup>34</sup> or that the price of the articles is small, so that the attention of the purchaser is not greatly engaged.<sup>35</sup>

Where goods are only sold to the trade,<sup>36</sup> on the other hand, or where only members of an association can buy at a store,<sup>37</sup> a higher degree of care and knowledge may be demanded than from the general public.

The matter of language and race may be important. Where the name of a Spanish newspaper was alleged to infringe that of another, but it was proved that no Spaniard would be deceived, it was held no wrong had been committed.<sup>38</sup> On the other hand the illiterate inhabitants of Singapore or the Hindu natives of India who cannot read English, or even their own language, are to be considered as the ordinary purchasers of goods sold to the countries they inhabit.<sup>39</sup> Consumers of beer, many of whom are foreigners and unacquainted with the English language,<sup>40</sup> or of Hostetter's Bitters, who buy a small quantity at a time for immediate use,<sup>41</sup> have especial consideration from the courts.

31. *Rowly v. Houghton*, 2 Brewst. 303; *Talcott v. Moore*, 6 Hun, 106; *Goodman v. Bohl*, 3 Tex. Civ. App. 183.

32. *Brown v. Doscher*, 73 Hun. 107.

33. *Clark v. Sharp*, 15 R. P. C. 141, 268.

34. *Carlsbad v. Thackeray*, 57 Fed. 18.

35. *Centaur Co. v. Robinson*, 91 Fed. 889.

36. *Nicholson v. Buchanan*, 19 R. P. C. 321.

37. *Civil Service Assoc. v. Dean*, 13 Ch. D. 512.

38. *Stephens v. De Conto*, 4 Abb. Pr. N. S. 49.

39. *Wallace v. King*, 68 L. T. 103; *Copley v. Kirk*, 84 L. T. Jour. 140; *Biegel Re.*, 4 R. P. C. 525; *Ralli v. Fleming*, Ind. L. R. 3 Calc. 416; *Wilkinson v. Griffith*, 8 R. P. C. 370; *Badische Fabrik v. Maneckji*, Ind. L. R. 17 Bombay 584.

40. *Kostering v. Seattle Co.*, 116 Fed. 621; *Hires v. Consumers Co.*, 100 Fed. 809.

41. *Myers v. Theller*, 38 Fed. 607.

Where an injunction was granted against the use of an infringing name on a tennis racquet<sup>42</sup> Judge Kekewich said: three classes of persons should be considered (1) "the thoroughly experienced men or women who play lawn tennis frequently . . . who do not choose a racquet because it is called Demon or by any other name, but because they know from experience what is a first-rate article and examine it carefully, inch by inch, and, if they order a second, take care to order one precisely of that kind." These would not be deceived; (2) "less experienced persons who buy racquets frequently" (not much danger); (3) largest class, inexperienced people, who do not play much, hear of Demon racquet and going to a shop see a racquet looking like Demon with Demotic on it and buy it. The court gave the plaintiff protection against the deception of these persons. In other classes of goods, the court has taken notice of the facts that many ignorant and illiterate persons buy Liver Regulator;<sup>43</sup> that bluing is sold "to purchasers in a very humble class in life, to washerwomen, little girls, and cottagers, who do their own washing and who go and buy . . . the smallest quantity of the article;"<sup>44</sup> and that the people who go into "small chemists' shops and buy medicines for themselves and their families" are people of little intelligence.<sup>45</sup> The law protected a trader in Yorkshire Relish, when he proved that the defendant deceived four women who belonged to the class of unwary purchasers. The sauce was largely bought by domestic servants, who asked for the goods by the name of the article and not of the maker, and when the sauce was bought and put into a cruets, detection was almost impossible.<sup>46</sup> Children and servants, who chiefly buy lemonade powder in England out of their pocket money, have been found careful to get the brand they want and to ask for it by name,<sup>47</sup> but articles like washing-powder, which "become associated in the public mind with the general appearance of the package," and of which the ordinary retail purchaser is not, "usually of a high degree of intelligence," have been held more to lend themselves to deception.<sup>48</sup> Children from five to fifteen years of age, who purchase school books and know

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42. *Slazenger v. Feltham*, 6 R. P. C. 531.

43. *Simmons v. Simmons*, 81 Fed. 163.

44. *Reckitt v. Kellogg*, 50 N. Y. Supp. 889.

45. *Eno v. Dunn*, 10 R. P. C. 261.

46. *Powell v. Birmingham Brewery Co.*, 11 R. P. C. 563, 12 R. P. C. 496, 13 R. P. C. 235.

47. *Clark v. Sharp*, 15 R. P. C. 141, 268.

48. *Fairbank v. Bell*, 77 Fed. 869; (Buyers of French coffee) *Sparks v. Harper*, 3 Queens L. J. 201.

them better from the pictures on the cover than from the text have been considered as entitled to especial consideration,<sup>49</sup> as have persons for whom detective stories are written.<sup>50</sup> "The unsuspecting and generally ignorant classes who are the purchasers and consumers of lye;"<sup>51</sup> the men who buy matches without examining carefully the box, turning it around on all sides to see differences;<sup>52</sup> snuff takers, who are nowadays usually of the lower classes of society;<sup>53</sup> persons who buy plug-cut chewing tobacco and are usually engaged in manual labor and usually buy without scrutiny of the tag and in small quantities;<sup>54</sup> purchasers of cigars, who make a hurried inspection of the goods in an ordinary store, where the light is not very good;<sup>55</sup> all these are classes of customers, whose habits have been considered important by the courts. Other special classes, who are met in the cases, are stablemen and grooms, who are often unable to read;<sup>56</sup> women who buy thread without critical observation;<sup>57</sup> purchasers of bread, who are frequently illiterate;<sup>58</sup> persons who know the reputation of Wamsutta cloths and do not notice that the other articles are labelled Wamyesta;<sup>59</sup> purchasers of hairpins, who rarely read the entire label on the goods;<sup>60</sup> purchasers of stove polish, many of whom are ignorant people and sometimes servant girls;<sup>61</sup> purchasers of shoe blacking, often old persons whose sight is dim, or young persons who are ignorant or lack experience;<sup>62</sup> persons who buy dry plates for photographic purposes;<sup>63</sup> purchasers of ale;<sup>64</sup> and purchasers of sewing machines,<sup>65</sup> who may be tailors and sempstresses or only common workmen and workwomen, with very limited ideas and imperfect knowledge.

Remembering that the patronage of the unwary is not less profit-

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49. *Doan v. Am. Book Co.*, 105 Fed. 773.

50. *Munro v. Beale*, 55 Hun. 312.

51. *Pa. Salt Co. v. Myers*, 79 Fed. 87.

52. *Christiansen Re.*, 3 R. P. C. 54.

53. *Garrett v. Garrett*, 79 Off. Gaz. 1681.

54. *Drummond Tob. Co. v. Addison Co.*, 52 Mo. App. 10.

55. *Feder v. Brundo*, 5 Ohio N. P. 275.

56. *Beddow v. Boyd*, 4 R. P. C. 310.

57. *Clark v. Armitage*, 67 Fed. 896.

58. *Fleischmann v. Schuckmann*, 62 How. Pr. 92.

59. *Wamsutta Co. v. Allen*, 12 Phila. 535.

60. *Williams v. Brooks*, 50 Conn. 278.

61. *Dixon v. Gugenheim*, 2 Brewst. 321.

62. *Brown v. Mercer*, 37 N. Y. Super Ct. 265.

63. *Derby Co. v. Pollard*, 2 T. L. R. 276.

64. *Bass v. Feigenspan*, 96 Fed. 206.

65. *Singer v. Long*, 11 Ch. D. 656; *Singer v. Wilson*, 3 A. C. 371.

able to the manufacturer than that of the careful,<sup>66</sup> the courts often consider the "uneducated and illiterate person" in questions of unfair competition, especially in dressing up and trademark cases. Lord Selborne<sup>67</sup> said that "imitation of a man's trademark in a manner liable to mislead the unwary cannot be justified by showing, either that the device or inscription upon the imitated mark is ambiguous and capable of being understood by different persons in different ways, or that a person who, carefully and intelligently, examined and studied it might not be misled.

Consequently, we find a number of cases in which conduct is restrained which is likely to deceive the only half wary, casual, unwary, incautious, unobservant, unsuspicious, heedless, or ignorant purchaser, sometimes when he does not even survey the goods at all.<sup>68</sup>

On the other hand, relief is refused when no person in his senses could be deceived<sup>69</sup> and courts will not "interfere for the sake of heedless people who know not and will not take the trouble to see what they are purchasing."<sup>70</sup> English courts seem stricter than the

66. *Williams v. Brooks*, 50 Conn. 278; *Colton v. Thomas*, 2 Brewst. 303; *Wolfe v. Harte*, 4 V. L. R. E. 125.

67. *Singer v. Loog*, 8 A. C. 26.

68. *Gillott v. Esterbrook*, 45 Barb. 455; *Saxlehner v. Eisner*, 93 Off. Gaz. 940; *Garde v. Mitchell*, 17 V. L. R. 209; *Saxlehner v. Nielson*, 93 Off. Gaz. 948; *Little v. Kellam*, 100 Fed. 253; *Cauffman v. Schuler*, 123 Fed. 205; *Kinney v. Maller*, 53 Hun. 340; *Barrett Co. v. Stern*, 67 N. Y. Supp. 595; *Ford v. Foster*, 7 Ch. App. 611; *Currie Re*, 13 R. P. C. 681; *Cochrane v. MacNish*, 13 R. P. C. 100; *Champlain v. Stoddart*, 30 Hun. 300; *Colman v. Crump*, 70 N. Y. 573; *Carlsbad v. Schultz*, 79 Off. Gaz. 1360; *Davis v. Reid*, 17 G. R. U. C. Ch. 69; *Johnston v. Orr Ewing*, 7 A. C. 219; *Colton v. Thomas*, 2 Brewst. 308; *Potter Corp. v. Miller*, 75 Fed. 656; *Guardian Co. v. Guardian Co.*, 50 L. J. Ch. 252; *Harrison v. Taylor*, 11 Jur. N. S. 408; *Walker v. Hochstaedter*, 85 Fed. 776; *Battle v. Finlay*, 45 Fed. 796; *Hoff v. Tarrant*, 71 Fed. 163; *Kelly v. Byles*, 28 W. R. 585; *De Youngs v. Jung*, 25 N. Y. Supp. 479; *Electro Silicon Co. v. Levy*, 59 How. Pr. 469; *Electro Silicon Co. v. Trask*, 59 How. Pr. 189; *Glenny v. Smith*, 13 L. T. N. S. 71; *Garrett v. British N. Borneo Co.*, 37 Sol. J. Ill.; *Bissell v. Bissell*, 121 Fed. 357; *Alaska Ass. v. Crooks*, 16 R. P. C. 503; *Boardman v. Meriden Co.*, 35 Conn. 402 ("unwary trader"); *Hawkins Re*, 11 N. Z. R. 688; *Tellow v. Tappan*, 85 Fed. 774; *Gessler v. Grieb*, 48 N. W. (Wis.) 1098; *McCaw v. Nichols*, 21 R. P. C. 15.

69. *Midland Co. v. Brush Co.*, 26 Sol. J. 465; *Cowen v. Hatton*, 46 L. T. N. S. 897; *Goodall v. Wilkinson*, 90 L. T. J. 357, 91 L. T. J. 29; *Payton v. Ward*, 17 R. P. C., appeal from 16 R. P. C. 424; *Payton v. Snelling*, 17 R. P. C. 43, 16 R. P. C. 287.

70. *Bradbury v. Beeton*, 39 L. J. Ch. 57.

American ones in this matter. Especially have they refused<sup>71</sup> to interfere when no intelligent person would be deceived who knew the distinctive features of the plaintiff's goods, though the seller might cover with his hand the distinctive parts. A customer who did not watch what symbol of a head was on a can of salmon was not held worthy of consideration. Yet it was an English judge who said with a sigh: "People are so very careless and the court has, with propriety, been tender of careless people"<sup>72</sup> and the English courts consider that such goods as soap are sold often to persons who cannot read and that those who can read ordinarily do not read the whole wrapper covering the goods,<sup>73</sup> but are injured, if the resemblance in general effect was calculated to deceive the unwary.<sup>74</sup> Persons in a humble station in life and uneducated persons are the ordinary purchasers of certain articles and in respect to those articles deserve and receive especial consideration.<sup>75</sup> So does the man or woman who has not the sharpest eyesight or the most active brains,<sup>76</sup> and the man who has not been accustomed to the general appearance of packages containing the article, but has merely read an advertisement of the goods and remembers the name.<sup>77</sup> In Canada, also, the court has restrained practices in the sale of an article which might deceive "ignorant persons not on their guard," though "no one of ordinary intelligence would be likely to mistake it,"<sup>78</sup> but in a Nova Scotia decision,<sup>79</sup> the court refused to interfere, unless it was shown that a person paying ordinary attention would be deceived and held that it was "not enough that a careless, inattentive, or illiterate purchaser might be deceived." It has been held that, where there has been actual fraud on the part of the defendant,

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71. *Alaska Co. v. Crooks*, 18 R. P. C. 129.

72. *Sensen v. Britton*, 16 R. P. C. 137; *Upper Assam Tea Co. v. Herbert*, 7 R. P. C. 183; *Paine v. Daniell*, 10 R. P. C. 71, 217. See *Wotherspoon v. Currie*, 42 L. J. Ch. 130; *Edleston v. Vick*, 23 Eng. L. & Eq. 51; *Hart v. Colley*, 7 R. P. C. 93.

73. *Lever v. Goodwin*, 4 R. P. C. 492.

74. *Jones v. Hallsworth*, 14 R. P. C. 225.

75. *Merriam v. Texas Siftings Co.*, 49 Fed. 944; *Hodgson v. Kinloch*, 15 R. P. C. 465; *Sparks v. Harper*, 3 Queens L. J. 201.

76. *Liebig Co. v. Chemists Sec.*, 13 R. P. C. 635. See *Archbold v. Sweet*, 5 Car. & P. 219.

77. *Fairbank v. Leukel*, 102 Fed. 327.

78. *Melchers v. De Keyper*, 6 Ex. C. R. Can. 82. See *Darling v. Barsalou*, 25 Lower Can. J. 37, overruled by 9 Can. S. C. R. 677.

79. *Johnson v. Parr*, Russ. Eq. Dec. 98. See also *Queen v. Authier*, Q. R. S. Q. B. 146.



the remedy may be given, without considering whether the "purchaser be wise or ignorant, careful or careless."<sup>80</sup>

In Canada,<sup>80a</sup> a court restrained a person from selling an article which might deceive the "cursory" observer retaining no very accurate recollection of plaintiff's article.

While many decisions hold that the person applying to the court, for relief, against a colorable imitation of trademark or other indicia of his goods, must show that the resemblance is such as would mislead not only heedless and unobservant persons, but also those of ordinary caution,<sup>81</sup> yet the sounder view is that although such purchasers, who buy hastily and with but little examination of the goods, have no reason to complain, as they must attribute any injury they may suffer to their own want of diligence, yet the trader, who is injured, should receive protection, for he stands on entirely different ground and no amount of diligence on his part will guard against the injury. The right to sell goods includes the sale to the incautious as well as to the cautious.<sup>82</sup> From what has already been said, it necessarily follows that the plaintiff has no remedy given him when the mass of purchasers, paying that attention which such persons usually do in buying the article in question, would not be deceived,<sup>83</sup> or when the difference between the two articles should lead to a distinction being made between them by the "most casual observer at any distance at which he could distinguish the appearance of these labels."<sup>84</sup>

The courts act to protect persons of ordinary intelligence and

80. *Mumm v. Frash*, 68 Off. Gaz. 143.

80a. *Whitney v. Hickling*, 5 Gr. U. C. Ch. 605.

81. *Brill v. Singer*, 41 Ohio St. 127; *Cantrell v. Butler*, 124 Fed. 290; *Wrisley v. Iowa Co.*, 122 Fed. 796; *Coats v. Merrick Thread Co.*, 63 Off. Gaz. 1531.

82. *Meriden Co. v. Parker*, 39 Conn. 450; *Brooklyn Co. v. Masury*, 25 Barb. 416; *Godillot v. Am. Grocery Co.* 71 Fed. 873.

83. *Hurricane Co. v. Miller*, 56 How. Pr. 234; *Beddow v. Boyd*, 4 R. P. C. 310; *Alff v. Radam*, 77 Tex. 530; *De Keyper v. De Keyper*, 4 Ex. C. R. Can. 71; *Comm. Adv'r. Ass. v. Haynes*, 49 N. Y. Supp. 938.

84. *Rall v. Siegel*, 116 Ill. 137; *Marshall v. Hawkins*, 4 N. Z. L. R. Ch. 59; *Pratt v. Astral Co.*, 27 Fed. 492; *Tarrant v. Hoff*, 78 Off. Gaz. 1607; *Clotworthy v. Schepp*, 52 Off. Gaz. 161; *Hubinger v. Eddy*, 76 Off. Gaz. 1120; *Centaur Co. v. Marshall*, 92 Fed. 605, 97 Fed. 785; *Van Camp v. Cruickshanks*, 90 Fed. 814; *Phillips v. Ogden*, 12 R. P. C. 325; *Leather Cloth Co. v. Am. Leather Cloth Co.*, 1 H. of L. Cas. 523; *Hasleton v. Hasleton*, 137 Ill. 231, 142 Ill. 494; *Landreth v. Landreth*, 29 Off. Gaz. 1131; *Adams v. Heisel*, 31 Fed. 279; *Pfeiffer v. Wilde*, 102 Fed. 658; *Parker Holmes Co., ex parte*, 100 Off. Gaz. 111; *Lorillard v. Peper*, 86 Fed. 956.

common sense and will not act to prevent a possibility, but rather a probability, of the deception of such persons.<sup>85</sup> Nor will they consider persons affected with color blindness,<sup>86</sup> those lacking intelligence, such as fools and idiots, nor those grossly careless. The fact that experienced witnesses testify that the defendant's goods have long been used and that they never heard of any deception arising through them is probative evidence that they are not deceptive to the ordinary purchaser.<sup>87</sup> The question as to the deception of the ordinary purchaser must usually be decided by the eye<sup>88</sup> and, when such purchaser would be easily deceived, if the two articles were exposed for sale side by side, there is no question that the courts will<sup>89</sup> give a remedy against such fraud. But purchasers are not bound to exercise a high degree of care, are apt to act quickly, and, seldom, have an opportunity of making any comparison whatever of the two articles.<sup>90</sup> The court generally acts on the assumption that there are only the defendant's goods before the purchaser and that he has only a memory of what the plaintiff's goods looked like.<sup>91</sup> Side by side, there may be hardly a probability of deception and the differences between the articles may be wide, but the incautious purchaser does not see them in that way and must trust to a treacherous memory. In many cases, he does not know that there are two similar articles sold, or has never seen the defendant's article before. The purchasing public goes to buy goods with only a general notion, or a

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85. *Price v. Jeyes*, 19 R. P. C. 17; *Brown v. Siedel*, 153 Pa. St. 60.

86. *Liggett & Myers v. Finser*, 45 Off. Gaz. 943 (U. S.); *Lere v. Harper*, 86 Fed. 481; *Singer v. Wilson*, 2 Ch. D. 434; *Wrisley Co. v. Iowa Soap Co.*, 104 Fed. 548; *Marshall v. Sidebotham*, 18 R. P. C. 43; *Wrigley v. Rouse*, 87 Fed. 589; *Sawyer v. Kellogg*, 7 Fed. 720; *Republique Francaise v. Saratoga Vichy*, 99 Fed. 733; *Potter v. Pasfield*, 102 Fed. 490; *Republique Francaise Schults*, 94 Fed. 500, 102 Fed. 153; *Richter v. Anchor Remedy Co.*, 52 Fed. 455.

87. *Day v. Webster*, 49 N. Y. Supp. 314.

88. *Sen Sen v. Britton*, 16 R. P. C. 137.

89. *Alaska Packer's Ass. v. Crooks*, 16 R. P. C. 503; *Ct. Tower St. Tea Co. v. Langford*, 5 R. P. C. 66.

90. *Paris Co. v. Hill*, 102 Fed. 148; *Pillsbury v. Pillsbury*, 64 Fed. 841; *Stuart v. Stewart*, 85 Fed. 778, overruled by 91 Fed. 243.

91. *Hubbuck v. Brown*, 17 R. P. C. 638; *Centaur Co. v. Hughes*, 91 Fed. 901; *Upper Assam Tea Co. v. Herbert*, 7 R. P. C. 183; *Wellman v. Ware*, 46 Fed. 289; *Hawkins Re*, 11 N. Z. R. 688; *Steinway v. Henshaw*, 5 R. P. C. 77; *Wilkinson v. Griffith*, 8 R. P. C. 370; *Pinto v. Badman*, 8 R. P. C. 181; *Eno's, T. M., ex parte*, 9 V. L. R. L. 335; *Hop Bitters Co. v. Wharton*, 10 V. L. R. L. 377; *Celluloid Co. v. Cellonite Co.*, 41 Off. Gaz. 693; *Champion v. Smith*, 21 N. S. W. R. Eq. 110; *Little v. Kellam*, 100 Fed. 353; *Glen Cove Co. v. Ludeman*, 32 Off. Gaz. 255.

more or less vague reminiscence of what are the salient features of the name or appearance of the desired article and being not well acquainted with the details of the name or appearance thereof, may be deceived, so the courts must be diligent and zealous in preventing such deception.

The ordinary purchaser is not only the one who buys directly from the manufacturer or selector of the goods, but, in this connection, regard must be had to the ultimate, as well as the immediate purchaser of the goods. The law does not regard as material the fact that the immediate vendee is not deceived, if there be put into the latter's hands the means of deceiving the consumers of the goods.<sup>92</sup> The questions of tradesman and customer, of local and general dealers, are to be considered by the courts, who remember that the products may go into the hands of thousands who are ignorant of the circumstances of origin. To put into the hands of another a weapon of fraud, to sell goods to a man, who is not deceived thereby, but who may deceive the ultimate purchaser of the goods, is a wrong to be restrained by law. The person guilty of such "contributory infringement" of his neighbor's rights is an accessory before the fact to the fraud and his conduct is fully as fraudulent as a direct deception. In one important class of cases in unfair competition, namely in those in which relief is asked for "passing off" goods,<sup>93</sup> the ultimate purchaser is not regarded. So representations made on invoices have not been considered, as the ultimate customers rarely see these invoices. In all trade-mark cases, however, the rule is strict that, although the representation between first vendor and purchaser be true, yet false representations through indicia placed on goods will be restrained. The goods were "meant to be sold to others, who would see only the trade-mark and were likely to be deceived by its resemblance" to that of the other trader.

Sometimes an intermediate purchaser<sup>94</sup> must be considered, *e. g.*,

92. *Hennessy v. Herrman*, 89 Fed. 669; *Sparks v. Harper*, 3 Queens L. J. 207; *Wyckoff v. Howe*, 110 Fed. 520; *Anglo Swiss Co. v. Metcalf*, 3 R. P. C. 28; *Wolfe v. Hart*, 4 V. L. R. E. 125; *Cochrane v. MacNish*, 13 R. P. C. 100; *Valentine v. Valentine*, 17 R. P. C. 673; *Manitowoc Co. v. Numsen*, 93 Fed. 196; *Coats v. Holbrook*, 2 Sandf. Ch. 586; *Edelston v. Edelston*, 9 Jur. N. S. 479; *Armstrong v. Raynes*, 1876-93 New Bruns. Eq. Cas. 144; *Taylor v. Carpenter*, Fed. Cas. 13, 785; *Le Page v. Russia Cement Co.*, 51 Fed. 941; *Sykes v. Sykes* (1824), 3 B. & C. 541; *Hodgson v. Kynock*, 15 R. P. C. 465; *U. S. v. Steffens*, Fed. Cas. 16, 384; *Coats v. Holbrook*, 2 Sandf. Ch. 586.

93. *Singer v. Wilson*, 2 Ch. D. 434, 8 A. C. 26; *Singer v. Loog*, 11 Ch. D. 656.

94. *Barlow v. Johnson*, 7 R. P. C. 395. See *Ky. Distilling & C. Co. v. Wathen*, 110 Fed. 641; *Hansen v. Siegel*, 110 Fed. 690.

the wholesale dealer would not be deceived nor the public which only cares for some article of the kind, *e. g.*, thick towels, but the retailer might be deceived as he wishes a certain make of thick towels, *e. g.*, the Osman and he will be protected.

It is not the wholesale or retail dealer, but rather the purchaser at retail in small quantities who is usually the ultimate customer.<sup>95</sup> Often, indeed, the manufacturer is affording "an excuse and a temptation to unscrupulous" retail dealers by furnishing them with goods which enable them to defraud the public, who as a rule do not know who make the goods.<sup>96</sup> The very survey of the two articles may suggest fraud and passing off to an unscrupulous middleman and the instrument of deception is put into his hand by the first vendor. The law reaches those who enable others to deceive the public,<sup>97</sup> even though they may make no direct false representations, but sell their goods as their own. These "true representations in aid of false ones but aggravate the fraud" it has been said, as they make the middlemen accomplices therein,<sup>98</sup> and sometimes even make the possibilities of deceiving ultimate purchasers "persuasive and effective arguments" to sell the goods.<sup>99</sup> "It is a pertinent fact, to be noted in this connection that the respondent's advertisements of his goods were inserted in journals that reached the trade and not the consumer and that his circulars were sent to jobbers and the trade" and to no others.<sup>100</sup>

On the other hand, shopmen's acts are not always proof of the manufacturer's deceit.<sup>101</sup> A dishonest middleman may deceive purchasers by covering the distinctive features of the trader's trademark<sup>102</sup> or an employee may sell goods in bulk and advise that they

95. *Conrad v. Uhrig*, 8 Mo. App. 277; *Wilkinson v. Griffith*, 8 R. P. C. 370; *Payton v. Snelling*, 16 R. P. C. 283, 17 R. P. C. 48; *Collinsplatt v. Finlayson*, 88 Fed. 693; *Fairbank v. Central Lard Co.*, 70 Off. Gaz. 635; *Fairbank v. Bell*, 77 Fed. 869; *Heinisch's Sons v. Boker*, 86 Fed. 765.

96. *Sawyer v. Horn*, 1 Fed. 24; *Hodgson v. Kynoch*, 15 R. P. C. 465; *Gage v. Canada Pub. Co.*, 6 Ont. R. 68; *Powell v. Birmingham Co.*, 12 R. P. C. 496, 13 R. P. C. 235; *Singer v. Spence*, 10 R. P. C. 297; *Bayer v. Baird*, 15 R. P. C. 615; *Edge v. Johnson*, 9 R. P. C. 134; *Fairbank v. Bell*, 77 Fed. 869; *Sykes v. Sykes* (1824), 3 B. & C. 541.

97. *Saxlehner v. Apollinaris Co.*, 14 R. P. C. 645; *Blair v. Stock*, 52 L. T. N. S. 123; *Lever v. Goodwin*, 4 R. P. C. 492; *N. E. Co. v. Marlborough Co.*, 168 Mass. 154; *Morgan v. Whittier*, 118 Fed. 657; *Hennessy v. White*, 6 W. W. & A. B. E. 216; *Taylor v. Carpenter*, Fed. Cas. 13, 784.

98. *Pillsbury v. Pillsbury*, 64 Fed. 841.

99. *Pa. Salt Co. v. Myers*, 79 Fed. 87.

100. *Baker v. Baker*, 78 Off. Gaz. 1427.

101. *Jones v. Hallworth*, 14 R. P. C. 225.

102. *Payton v. Snelling*, 17 R. P. C. 628.

be placed in the plaintiff's empty bottles without the defendant's knowledge.<sup>103</sup> In such case, there is no restraint against the first vendor. A contract, however, to purchase the plaintiff's labels and bags and then fill them with another's goods, *e. g.*, seeds, is clearly not enforceable.<sup>104</sup>

Certain classes of purchasers are of interest. As the general rule is that "no man, however honest his intentions, has a right to adopt and use so much of his rival's established trade-mark, as will enable any dishonest trader, into whose hands his own goods may come, to sell them as the goods of his rival," so a trade-mark consisting of two elephants and, consequently, known as the Hathi in India, was enjoined, as so similar to another containing the same device as to delude Hindus, though the similarity would not deceive Englishmen, nor dealers in foreign markets.<sup>105</sup>

So people who come into an ordinary shop to buy matches,<sup>106</sup> people who buy one red cross plaster<sup>107</sup> and so have no means of distinguishing the goods through indicia placed on the wrapper of the package, persons who buy snuff,<sup>108</sup> "mere cigarette smokers"<sup>109</sup> are considered as special classes of consuming purchasers.

A printer who strikes off a label for cigars and sells it to anyone to cover such goods as the purchaser chooses<sup>110</sup> is "chargeable with facilitating others in making false representations" and a maker of cigar boxes was enjoined who sold with them imitations of the plaintiff's lithographs that retailers might defraud customers by using them.<sup>11</sup>

Purchasers of shovels,<sup>112</sup> of plows,<sup>113</sup> and of tools<sup>114</sup> are also

103. *Hostetter v. Brunn*, 107 Fed. 707.

104. *Bloss v. Bloomer*, 23 Barb. 604.

105. *Orr Ewing v. Johnston*, 27 W. R. 575, 28 W. R. 330, 7 A. C. 219.

106. *Christiansen Re*, 3 R. P. C. 54.

107. *Johnson v. Bauer*, 82 Fed. 662; *Collins Co. v. Cowen*, 3 K. & J. 428.

108. *Garrett v. Garrett*, 79 Off. Gaz. 1681.

109. *Wood v. Lambert*, 3 R. P. C. 81; *Richards v. Butler*, 8 R. P. C. 37, 249.

110. *Schumacher v. Schwencke*, 36 Off. Gaz. 457. See *Christie v. Foster Brewing Co.*, 18 V. L. R. 292.

111. *Cuervo v. Henkel*, 60 Off. Gaz. 440; *Southern White Lead Co. v. Carey*, 33 Off. Gaz. 624; *Southern White Lead Co. v. Coit*, 39 Fed. 482.

112. *Collins v. Ames*, 18 Fed. 511. See *Lalancé & Co. v. National & Co.*, 109 Fed. 317.

113. *Avery v. Meikle*, 27 Off. Gaz. 1027. In *Putnam Nail Co.'s Appeal*, Dig. 725, this question was not considered and the defendant was not restrained from selling a bronzed nail like plaintiff's. The bronzing was merely for ornament.

114. *Collins v. Walker*, 7 W. R. 222.

classes of ultimate purchasers, which have been considered by the courts and there are a large number of decisions as to the consumers of liquids,<sup>115</sup> such as bitters,<sup>116</sup> liquours,<sup>117</sup> whiskey<sup>118</sup> and root-beer.<sup>119</sup> Thus the wholesale dealer who sells to retailers champagne bottles, so dressed up as to put in their hands an effective means of deception<sup>120</sup> is held to be a co-conspirator with them and the sale of different packages by such wholesalers will not protect them from the law, if the marks of similarity on the bottle which the purchasers of small quantities buy are too numerous and important.<sup>121</sup> It has been held allowable to sell spurious bottles, if truthfully named<sup>122</sup> and the sale of an extract, from which imitation bitters may be made, has been allowed, as in this case the defendants provided only a part of the means employed in effecting fraud,<sup>123</sup> but the person who sells spurious bitters in bulk, advising dealers to make a fraudulent substitution of them for those of another will be enjoined.<sup>124</sup> When a dealer sells spurious bitters in bulk in large demijohns and gives empty genuine bottles with each sale<sup>125</sup> he places in the retailer's hands power to deceive the general public and is guilty of contributory infringement. So too it "is wrong to sell the defendant's goods in the plaintiff's bottles," even though non-infringing labels<sup>126</sup> and boxes branded with the defendant's name are used and it is also wrong to fill plaintiff's bottles with another compound for a man who was going to sell it.<sup>127</sup> In all these cases equity looks beyond the original acts, finds that their ultimate object and effect were to enable retailers to palm off fraudulent imitations on an unsuspecting public, and enjoins the authors of these acts.

*Bernard C. Steiner, Ph.D.*

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115. *Brown v. Strauss*, 37 Fed. 361.

116. Especially *Hostetter's, e. g. Myers v. Theller*, 38 Fed. 607.

117. *Grezier v. Antran*, 13 R. P. C. 1 (*Chartreuse*). *Societe v. Western Distilling Co.*, 42 Fed. 96. (*Benedictine*.)

118. *White v. Miller*, 50 Fed. 277.

119. *Hires v. Consumers Co.*, 100 Fed. 809.

120. *Mumm v. Frash*, 68 Off. Gaz. 143.

121. *Wolfe v. Alsop*, 12 V. L. R. 421. See *Ford v. Foster*, 7 Ch. App. 611.

122. *Hostetter v. Van Vorst*, 69 Off. Gaz. 1648.

123. *Hostetter v. Fries*, 17 Fed. 621.

124. *Hostetter v. Bruggemann*, 56 Off. Gaz. 530.

125. *Hostetter v. Sommers*, 84 Fed. 333; *Hostetter v. Becker*, 73 Fed. 297; *Hostetter v. Schneider*, 107 Fed. 705.

126. *Hostetter v. Anderson*, 1 V. R. E. 7.

127. *Rose v. Loftus*, 47 L. J. Ch. 576.

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## LABOR LEGISLATION—POLICE POWER OF THE STATE.

On August 10, 1906, the Court of Special Sessions of New York City, handed down a decision which has aroused much discussion among the members of the legal profession generally. The Court decided in the case of *People v. Williams*, that that portion of Section 77, Article 6, entitled "Factories" of the General Laws relating to Labor, which provided that no female shall be employed or permitted to work in any factory before 6 o'clock in the morning or after 9 o'clock in the evening of any day, etc., is an unconstitutional invasion of the rights of individual liberty and property and not within the police power of the Legislature.

Strange to say, this decision has been the occasion of rather severe comment by several of the current legal periodicals. In examining this decision the fact must not be overlooked, however, that its scope is by no means so far reaching as a cursory reading might seem to indicate. In fact another clause of the same statute, prohibiting women from working in factories more than ten hours a day, was not held to be unconstitutional, on the contrary the court intimated that the latter provision might well be viewed as a valid health law. *People v. Williams*, the court confined itself to a condemnation of that portion of the statute which authorized the conviction of an employer who should employ a woman in manufacturing during certain prescribed hours irrespective of the number of hours she had worked or had contracted to work on the day in question.

At present, in spite of the decision by the Supreme Court of the United States, in *Lochner v. New York*, 198 U. S. 45, holding

the limitation of a ten-hour day for employees of bakeries unconstitutional, there seems to be a growing sentiment in favor of the power of the State to enact such laws under the exercise of its police power.

To give an exact definition of the police power of the Legislature, which shall be neither too narrow nor too comprehensive, is probably impossible. The courts have consistently refused to lay down any exact definition. *Stone v. Mississippi*, 101 U. S. 814. The police power of a State, however, is co-extensive with self-protection, and has been, not inaptly, termed "the law of overruling necessity." It is that inherent and plenary power in the State which enables it to prohibit all things detrimental to the comfort and welfare of society. *Lakeview v. Roschill Cemetery*, 70 Ill. 194. The Legislature is endowed with discretion as to the extent to which its provisions shall go provided its acts do not go beyond the great principle of securing the public welfare. Its duty to provide for the public health and safety within well defined limits and with discretion is imperative. *State v. Noyes*, 47 Me. 189. But the police power of the State can never be invoked as an excuse for an arbitrary, oppressive and unjust legislation not in any way promotive of the public health, safety or morals. *Davidson v. New Orleans*, 96 U. S. 97.

In many states statutes, which apparently regulate the individual freedom of contract to a considerable degree, have recently been sustained as a valid exercise of the police power of the State. The Supreme Court of Massachusetts in *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 283, held that a statute forbidding the employment of women or children under 18, in manufacturing more than ten hours a day was constitutional as a valid health regulation. Also in the more recent case *State v. Muller*, (Oregon) 85 Pac. Rep. 855, it was held that a statute making it a misdemeanor for any employer to require any female to work in any factory, laundry or mechanical establishment more than ten hours a day, did not violate the 14th. Amendment of the Federal Constitution.

Such statutes as those just described must, however, be sharply distinguished from those of the character of the one repudiated in *People v. Williams*, Supra. There is no doubt that laws restricting the hours of labor uniformly for both sexes to reasonable periods would be valid as health regulations. And if we look upon limitations of the hours of labor in factories as a measure of physical protection, a discrimination between men and women cannot be condemned as arbitrary. *Freund on Police Power*, p. 298. But in every case where legislative enactments, which operate upon classes of individuals only, have been held valid, it has been where the classification was reasonable and not arbitrary. *Leep v. St. Louis Ry. Co.*, 58 Ark. 407.

Public policy requires the utmost freedom of contract. *Printing Co. v. Lampson*, L. R. Eq., Cas. 462. Under the constitution women are entitled to the same rights as are secured to men. The law accords to her as to every other citizen, the



natural right to gain a livelihood by intelligence, honesty and industry in the arts, sciences, professions or other vocations. Before the law her right to a choice of vocations cannot be denied or abridged on account of sex. *Re Leach's Petition*, 134 Ind. 665. There would seem to be no reasonable ground except the single one of physical protection why a woman should be deprived of the right to determine for herself how many hours during each day she can and may work in an employment conceded to be lawful in itself and suitable for her to engage in. *Ritche v. People*, 155 Ill. 88; *Ex parte Kubach*, 8t Cal. 274. The police power, no matter how broad, is not above the Constitution. It is true that the conflict between the legislative act and a specific provisions of the Constitution or fundamental law must be clearly apparent or the Judiciary will not be justified in holding it unconstitutional. *Woodworth v. Union Pacific Ry. Co.* 18 Cal. 600. But to be sustained, the act passed in pursuance of the police power must have some apparent relation to the ends sought to be accomplished, *viz.*, to the comfort safety and welfare of society. It cannot invade the rights of persons and property under the guise of a police regulation when it is not such in fact. *Re Jacobs*, 98 N. Y. 98; *People v. Gillson*, 109 N. Y. 389.

Viewed in the light of the forgoing suggestions, the decision in *People v. Williams*, would seem to be in accord with the prevailing opinion at the present time. As was said in one of the comments on the case, it is probable that the chivalric favoritism for women, which prevails in this country probably more than anywhere else, rather than any scientific conviction of sanitary or hygienic ends, is the basis of such legislation.

#### CONTRACTS IN RESTRAINT OF TRADE—CLEMONS VS. MEADOWS.

A recent case reported in 94 S. W. 13, decided by the Court of Appeals of Kentucky, involves the legality of a contract between two competing hotel proprietors, whereby one agreed, for a consideration, to keep his hotel closed for a period of three years. This agreement was held to be void, as the hotel keeper owed a duty to the public, and could not contract in violation of this duty.

The law in regard to contracts in restraint of trade has undergone a gradual and beneficial reform, largely due to the changed conditions of the commercial world. The earliest cases reported on this subject show that contracts in restraint of trade, even though limited as to time and place were void as being against the common law. Year Book 2 Hers. 5 fol. 5, p. 26 (1415).

The strictness of this rule was due to the English law of apprenticeship. This law forbade any trade until a certain apprenticeship had been served and then a formal admission to a guild was required. The tradesman must have continued in that guild or do nothing. Naturally any agreement which would restrain his practicing his trade was severely dealt with. The courts would not allow a man to barter away his usefulness, and by enforced idleness, to a certain extent pauperize himself.

The law in this form remained for two hundred years unchanged. But in 1621, in the case of *Broad vs. Jollyfe*, Cro. jac. 596, the law was relaxed somewhat, and it was decided that, for a valuable consideration, one might agree not to use his trade in a particular place. It was said that the consideration was necessary in order to balance the restraint of trade. So too in *Davis vs. Mason*, T. R. 118, decided in 1793, a contract to refrain from a trade limited as to time and place, and founded on a valuable consideration, was held good. The basis of these decisions was that the restraint was limited in space for as it is said Cowen 307, decided in 1827, that "a restraint throughout the kingdom" was bad.

The final step in the development of this law, as shown by the modern authorities, was to disregard the partiality of the restraint, and decide the legality of each contract on its own facts and circumstances. The question as to the validity of the restraint imposed at present depends on what is reasonably necessary to protect the person for whose benefit the contract was made, having regard to the nature of the business and the territory embraced in its trading operations. *Diamond Match Co. vs. Roberr*, also *National Benefit Co. vs. Union Hospital Co.*, 11 S. R. A. 437 and cases cited.

In the case of persons owing a duty to the public, another question enters into such a contract. Here the public is affected more directly, and if the public interests are endangered, the contract threatening them must fall. In *Clemons vs. Meadows*, the two contracting parties were the owners of the only two first-class hotels in the town. An agreement to close one although for a limited time might affect the travelling public seriously. Although it is admitted that a hotel-proprietor might close his hotel if he so desires, yet the interest of the public demands that he shall not contract away his right to keep his hotel open in favor of a competing hotel manager. The court thus applies the same reasoning to agreements in respect to hotels as it does to similar contracts between railroads; the *ratio decidendi* is not the character of the contract, but the character of the contracting parties. But this power of the courts to declare a contract void on the grounds of public policy should be exercised guardedly, as it is quite as much in accord with justice that the liberty to make a legal contract should be protected as that a remedy for a breach of an illegal contract should be denied.

#### THE RIGHT TO SPECULATE IN THEATRE TICKETS UPHELD.

A decision of interest to proprietors of theatres, college athletic associations and all who sell tickets for any public performance or amusement was recently rendered by the Supreme Court of California in the case of *Ex Parte Quarg*, reported in the 84 Pac. 766.

In 1905 the Legislature of California passed a statute pro-

hibiting any person from selling tickets to theatres or other public places of amusement for a price higher than that originally charged by the management. An examination of the statutes of the various states discloses no similar enactments and it was probably passed in response to the constantly growing demand for the suppression of the professional ticket speculator.

The act is declared unconstitutional—not because it contravenes the 14th Amendment as to liberty of contract—but generally as opposed to that clause of the California constitution which secures to every person the right of “acquiring, possessing and protecting property.”

There are two subsidiary grounds which seem to have much bearing on the final decision.

The first is that the right to provide entertainment for the public and to sell tickets therefor is strictly private and not a matter of such public concern or general interest as to come within the police power on the basis of protecting the public health, morals, safety or general welfare.

The second ground is that the statute in question does not attempt to prevent the simple resale or transfer of such tickets but only a resale at an *advanced* price over the original selling price and also that it is directed against the resale of all tickets whether assignable or not. Under the latter objection either or both the original or subsequent owners are bound by a scale of prices fixed at a level prescribed by the state.

It is at least questionable whether in any of the other states a theatre ticket is *property*. At common law it was a mere license revocable at the option of the original seller and to be held upon any condition which he might see fit to print upon it. Should the holder be refused admittance or, under the earlier decisions, even if expelled, his only redress was an action for the purchase price and the direct expenses to which he had been put by the refusal or ejection. *Horney v. Nixon*, 213 Pa. 20 (decided in 1905).

The right of the original vendor to make the ticket not transferable by a printed notice thereon was undisputed or at least not seriously contested, at least in this country, until the case of *Hollister v. Hayman*, 183 N. Y. 250. This was a test case and arose from the endeavors of a New York manager to drive away the speculators from the sidewalk in front of his theatre. All tickets sold at the box-office contained the restriction that they would not be honored if bought from *anyone* on the sidewalk in front of the theatre. The 14th Amendment was invoked by the speculators but the manager's right to freely impose any lawful conditions he saw fit was upheld by the Court of Appeals.

In 1893 the Legislature of California passed an act making a theatre ticket property, when sold unconditionally, and providing that any manager, proprietor, etc., who should refuse the holder admission to the place of amusement be fined \$100, making a demand for admission necessary and operating only in

favor of those who presented themselves in proper condition for admission.

Tickets on which any conditions were printed or restrictions made in writing or printing by the original vendor were excepted from the operation of the act. In the case of *Greenberg v. Western Turf Assoc.*, 140 Cal. 360, the Supreme Court of California held the act to be constitutional and by this decision, probably for the first time, a theatre ticket was made property in the full sense of the word.

Conceding therefore that the regulation of traffic in theatre tickets is beyond the police power of the state, the decision in the latest case (*Ex Parte Quarq*) is justified by the statute of 1903, making the ticket property when sold without conditions. The distinction drawn between the regulation of all sales and the prohibition of sales at an advance while clear enough is unnecessary to the decision of the case.

While all theatre-goers realize and feel the effect of the tendency to manipulate the sale of tickets for all the popular amusements and to hold the most desirable seats at almost prohibitive figures, a summary of the decisions would indicate that the remedy must be provided by the proprietors or managers of the amusements and that such control or regulation is entirely beyond the power of the Legislatures.

THE RIGHT OF A JURY TO DRAW ANY INFERENCE FROM THE  
REFUSAL OF A PARTY TO WAIVE PRIVILEGE.

In the late case of the *Penna. R. R. Co. v. Durkee*, decided July 24, 1906, the U. S. Circuit Court of Appeals for the second circuit overrules the Appellate Division of the New York Supreme Court, by holding that in an action for damages, for injuries to the person, the trial judge properly refused to charge the jury that they might infer that the plaintiff's refusal to waive her privilege, and allow her physician to testify as to her condition, was due to the fact that such testimony would have been unfavorable to her, or in fact to make any inference at all.

This question of inference from refusal of party to waive privilege has been a long mooted one, and in the case of *Deutschmann v. Third Ave. R. R. Co.*, 87 App. Div. 503, where the facts were very similar, the Appellate Division holds directly opposite to the case under discussion, and in the opinion says; "the jury is always justified in talking into consideration the attitude, appearance, and acts of parties and witnesses upon a trial, and to deduce therefrom such inferences as fairly arise out of the given circumstances, and we see no reason why they may not also take into consideration any objection interposed which shuts out the introduction of testimony. And in *William v. Rock R. Co.*, 3 App. Div. 109, the court in discussing this question says: "I think the rule is as applicable to a case in which a party fails to interrogate a friendly witness, so situated as to be presumed to have knowledge of the existence or non-existence, of the vital facts in

issue, as it is in the case of a failure to produce such a witness. I think the omission to interrogate a friendly witness in respect to facts presumably within his knowledge, is more significant than the failure to call such a person as a witness, and that the presumption that the testimony would not have been favorable to the party's case is stronger than the one which arises from the failure to produce such a person as a witness." To like effect are *Kane v. Rochester Ry. Co.*, 74 App. Div. 575, and *People v. Hovey*, 92 N. Y. 554. The upholders of this strict construction, adopted by the Appellate Division, base their opinion also on the ground of fraud and the great dangers arising from the abuse of the privilege where a more liberal view is taken.

CONTRADICTORY STATEMENTS—STATEMENTS CONSISTENT WITH TESTIMONY.

In *Burks v. State*, 93 S. W., 983, decided by the Supreme Court of Arkansas, in March, 1906, it was held that where a witness has denied having made statements contradictory of his testimony, and evidence of contradictory statements is admitted, former statements of his consistent with his testimony are not admissible to support him, in the absence of proof of change in the circumstances or relations which might have prompted a recent fabrication or design to misrepresent the facts.

In *Robb v. Hackley*, 23 Wend. 52, it was strongly asserted by Bronson, J., "But as a general, almost universal rule, evidence of what the witness has said out of court, cannot be received to fortify his testimony. It violates the first principle in the law of evidence to allow a party to be affected either in person, or property, by the declaration of a witness made without oath. It is no answer to say that such evidence will not give credit and, therefore, can do no harm. Evidence should never be given the jury which they are not at liberty to believe."

Formerly in England, previous consonant statements by a witness were considered admissible in evidence to support his testimony, given by him at the trial, the same as previous inconsistent statements to impeach him. *McCord v. State*, 83 Ga. 521.

This broad rule, however, was found to be radically unsound and from the time of the case *King v. Parker*, 3 Douglass 242, has generally been considered as exploded.

A remnant of the rule may be expressed as we find it in 1 Thomp. Tr. Sec. 574, where the witness is charged with testifying under influence of some motive prompting him to make a false statement, it may be shown that he made similar statements at a time when the imputed motive had no existence. This view is entertained by Greenleaf, but he otherwise follows the great weight of authority which hold that such statements are not admissible in evidence to fortify the testimony of the witness.

The most that could be claimed for such testimony in this view, would be, that it rendered the last statement more prob-

able and worthy of credit, because, although the witness had made a contradictory statement he had made another statement similar to those to which he had testified before a jury. *Com. v. Jenkins*, 10 Gray 485.

A man untruthful out of court is likely to be untruthful in court. Since the self contradiction is conceded, it remains a damaging fact, and it is in no sense explained away by the consistent statement. It is just as discrediting if once uttered, even though the other story has been consistently told a score of times. *Kipp v. Silverman*, 25 Mont. 295.

Although the above side of the question as to the inadmissibility of such statements is supported by an overwhelming weight of authority, yet the courts which hold to the doctrine based on the admissibility of such consistent statement are not entirely void of reason. The admissibility of such evidence rests on the obvious principle, that as conflicting statements impair, so uniform and consistent statements sustain and strengthen his credit before a jury. This reasoning, however, is not true to generally accepted principles. All will concede that an untruth leaves its mark on the character of the publisher and no amount of good done by the person can clear the character of that blemish. In as much as this applies to every day affairs of life, why depart from the principle simply because it is being acted upon in legal proceedings? In some jurisdictions such a statement is admitted for the purpose of sustaining the credibility of the witness, but not for the purpose of confirming his statement as to the facts sworn to by him at the trial. *State v. Parish*, 79 N. C. 610.

Even in those jurisdictions where consistent statements are allowed, the courts are unwilling to announce the doctrine unqualifiedly, but hedge the principle about with innumerable refinements.

#### NOVATION DISTINGUISHED FROM ACCORD WITHOUT SATISFACTION.

The tendency of the courts is to favor compromise agreements, and to support their terms wherever possible. The question, however, whether the compromise agreement will be considered as a novation, or as an accord without satisfaction is often times of great difficulty to determine. If a novation, the new contract completely extinguishes the old and forms the basis of further settlement. If it is an accord without satisfaction, the old contract survives and its terms may be enforced.

In *Bandman v. Finn*, decided June 21, 1906, in New York Court of Appeals on an appeal from the Appellate Division (89 N. Y. App. 504), Cullen, Ch. J. reviews this question. Here there was an unmaturred and contingent obligation, for which the plaintiff had no cause of action. The parties had agreed for a settlement by the payment of a smaller amount than that contemplated upon the happening of the contingency. Such an agreement, it was held, constituted a novation and the plaintiff

was not allowed to recover on his original obligation. Haight J., *dissenting*.

The common conception of a novation is that of an agreement whereby a third person is substituted to the rights and liabilities of one of the original contractors. The form of novation here treated is that of a substitution of a new agreement for an old one, the parties remaining the same. In a novation there must be an extinguishment of the original obligation by the substitution of a new contract. A cause of action on contract or tort may be extinguished by an agreement between the parties. There is no need that this agreement which is the consideration for the satisfaction should be executed; it may be executory. If the subsequent agreement is accepted in satisfaction, and this appears expressly or by implication, the original cause of action is merged and extinguished. *Kromer v. Heim*, 75 N. Y. 574. A new contract inconsistent with the original impliedly discharges the latter without express provision to that effect. *Renard v. Sampson*, 12 N. Y. 561; *Stow v. Russel*, 36 Ill. 18.

If one having a debt or claim against another, satisfies or releases it in consideration of an executory promise by the debtor, he cannot afterward enforce his original cause of action upon a mere failure of the other party to perform his promise, for he has a remedy to compel performance. *Morehouse v. Second N. B.*, 98 N. Y. 503. A promise itself constitutes sufficient consideration to support a new agreement. *Nassoiz v. Tomlinson*, 148 N. Y. 326. It is not, therefore, material whether the disputed claims were valid or not. *Wehrum v. Kuhn*, 61 N. Y. 62; *Flegal v. Hoover*, 156 Penn. St. 276. But the claims must have been bona-fide. Cases collected, 2 Ed. Clark on Cont. 125.

Accord and satisfaction is an agreement between two parties to give and accept something in satisfaction of a right of action which one has against the other, which when performed is a bar to all actions upon this account (*Bouvier's Dict.*) The original obligation must be an existing obligation and continue until complete execution of the new agreement. If the execution of the new agreement fails the original obligation survives. *Hearn v. Kiehl*, 38 Penn. St. 146. While a new agreement may not discharge a prior contract the performance of the new agreement will do so. *Rogers v. Rogers*, 139 Mass. 440; *Thompson v. Poor*, 147 N. Y. 402. Where an accord is relied on it must be executed; readiness to perform is not sufficient, nor is part performance adequate. An accord must always be entirely executed and not executory in any part. 2 Parsons on Cont. 193; *Russel v. Sytle*, 6 Wend. 390. Where a novation is relied, on failure to perform does not subject the party to liability under the old original debt or claim. It does not work the hardship which failure to perform an accord often does, and for this reason is encouraged by the courts. Accord and satisfaction when it consists in the substitution of a new contract for an old one, and the substituted contract is accepted without performance as a satisfaction of the old

contract, is a novation. (Note to *Harrison v Henderson*, 67 Kan 194) in 100 Am. St. Rep. 393.)

The courts in every case try to carry out the intention of the parties manifested by the compromise agreements, and as intimated above lean towards construing doubtful cases as novations, rather than accords without satisfaction. The interests of justice are thus considered better maintained.

This matter of privileged communication is of great antiquity, and is one of the safeguards that both the American and English courts have seen fit to throw about private affairs, and to preserve inviolate the confidential relations of patients with their physicians and clients with their lawyers. It is a safeguard similar to that recognized in criminal cases where no inference is allowed to be drawn from the failure of the accused to take the stand. To allow any inference to be drawn either favorable, or unfavorable, from a refusal to waive the privilege of a confidential communication to a physician is only to nullify the effect of such a provision. It is true that the privilege is susceptible of great abuse, but the very strict construction of the rule, given to it by the Appellate Division, in doing away with this evil, tends to cause a much greater evil by practically abolishing the privilege itself.

The text books and the other states uphold the decision of the Circuit Court of Appeals and Wigmore in his work on Evidence, Sec. 2386 specifically says: "When the privilege is claimed by a patient who is a party, no inference as to the facts suppressed can be drawn" and the Supreme Court of Indiana in *Hackney, et al. v. Foyce, et al*, 156 Ind. 535 holds that: "The purpose of the statute has its roots in public policy, and is intended to promote that confidence and full disclosure often absolutely necessary to a correct treatment of the patient, and which may be withheld under impending danger of publication. \* \* \* Shall the efficacy of the statute be destroyed by indirection? To claim the protection of the statute is the legal right of a patient, or his representative, and of no less inviolability than any other personal right, and it is wholly inconsistent with that right to say that its exercise in a judicial proceeding shall be allowed to prejudice the cause of him who claims it." On grounds of logic and reason, the Appellate Division should adopt this rule of evidence sanctioned by the general consensus of judicial opinion, but the court closes its eyes to these considerations and justifies under *stare decisis*.



## RECENT CASES.

CARRIERS—LOSS OF MANUSCRIPT—MEASURE OF DAMAGES.—SOUTHERN EXPRESS COMPANY v. OWENS, 41 SOUTHERN REP. 752 (ALABAMA).—*Held*, that in the absence of evidence of the market value of a lost manuscript it is proper to permit the plaintiff to testify as to the amount of time he had spent in the preparation of the manuscript and what he considered it worth, on the ground that where an article is so unusual in character that the market value cannot be determined, damages must be ascertained in some rational way.

CARRIERS—PASSENGERS—INJURIES—NEGLIGENCE—PROXIMATE CAUSE.—SNYDER v. COLORADO SPRINGS & C. C. D. RY. CO., 85 PACIFIC REP. 686 (COLO.). A passenger on a crowded car stood near the door with his hand resting on the door jamb. There were people between him and the door and some on the steps. The conductor in pushing his way through the crowd pressed the passenger against a third person sitting in a seat who gave the passenger a push, throwing him from the car.—*Held*, that the proximate cause of the injury was, as a matter of law, the action of the third person, for which the carrier was not liable.

The sole question here to be determined is,—what was the proximate cause of the accident? If the action of the conductor was the proximate cause then the defendant is liable. *Bowyer's Law Dict.*, Vol. II, page 790. defines proximate cause as follows: "That which, in a natural and continuous sequence, unbroken by any new cause, produces an event and without which the event would not have occurred." The authorities are uniform on the point of holding the proximate cause liable for the injury, *Cooley on Torts*, 70. But they differ in the application of the rule, 93 U. S. 130. To render a railway company liable for injuries to one passenger by another, it must appear that the company was negligent in failing to put the passenger, actually doing the injury, off the car, *Louisville & N. R. Co. v. McEwan*, 31 S. W. 465. But the conductor must have had notice or have reasonably foreseen that the passenger doing the injury was dangerous, *Spohn v. Mo. Pac. Ry. Co.*, 87 Mo. 74. Would it be reasonable here for the conductor to foresee that the passenger would become irritated and push the other off the car? But a different view must be entertained if the original act of the conductor was wrongful. In other words, if he puts in motion a train of events which finally culminated in the accident, *Clark v. Chambers*, 3 Q. B. Div. 327; *Scott v. Shepherd*, 3 Wils. 403. (The latter being the famous and oft quoted "lighted squib case"). However, the decision should be consistent with principles of rational justice, *Baltimore & Potomac R. R. Co. v. Reaney*, 42 Md. 117. The case at hand, considering all the facts, seems to be rightly decided. *Adrian A. Pierson, (Ed.).*

CARRIERS—CONTRIBUTORY NEGLIGENCE—ALIGHTING FROM MOVING TRAIN.—TEXAS & P. RY. CO. v. WHITELEY, 96 S. W. 108 (TEX.).—*Held*, alighting from a moving train is not contributory negligence *per se*.

Whether a person who alights from a moving train is guilty of contributory negligence is a question of fact for the jury, depending on attendant circumstances. *Little Rock & Ft. S. Ry. Co. v. Atkins*, 46 Ark. 423; *Chicago*

*City Ry. Co. v. Mumford*, 97 Ill. 560; *Galveston, H. & S. F. Ry. Co. v. Smith*, 59 Texas 406. And one so alighting from a moving train may recover for an accident to which his act does not contribute. *Van Ostrom v. N. Y. Cent. & H. R. R.R. Co.*, 35 Hun. 590. A passenger alighting from a moving train at direction of brakeman is not as matter of law guilty of contributory negligence where there was no obvious danger. *Jones v. B. & O. R. Co.*, 21 D. C. 346; *Delaware & H. Canal Co. v. Webster*, 6 Atl. 841. But if conductor ordered a passenger to leave train while in motion the company would be liable even though the passenger was guilty of negligence. *R. R. Co. v. Singleton*, 66 Ga. 252.

COMMERCE—INTERSTATE COMMERCE—INTOXICATING LIQUORS.—EX PARTE MASSEY, 92 S. W. 1086 (TEXAS).—*Held*, that a statute making it a misdemeanor "to solicit an order for the sale" of intoxicating liquors within local option districts is a violation of the interstate commerce clause of the Federal Constitution.

When liquor is sold as an import from another state and Congress has clearly the power to regulate, yet as Congress has made no regulation on the subject, the traffic may be lawfully regulated by state as soon as it is landed in its territory. *License Cases*, 5 How. 504 and 586 (N. H., R. I., Mass.). This case was overruled by *Leisy v. Hardin*, 135 U. S. 100. Whenever the law of a state amounts essentially to a regulation of commerce among the states, as it does when it inhibits directly or indirectly the receipt of a commodity before it has ceased to become an article of trade between one state and another, it comes in conflict with the interstate commerce clause of the Constitution and is void. *Leisy v. Hardin*, *supra*. The right to regulate the sale of a commodity after it has been brought into the state does not carry with it the power to prevent its introduction by transportation from another state. *Bowman v. Chicago, etc., Ry. Co.*, 125 U. S. 465, 500 (Ia.). The sale of intoxicating liquors is a legitimate subject of trade and interstate commerce, and is subject, as such, to no restrictions unless the same can be justified under the police power of the state. *McCulloch v. Brown*, 23 L. R. A. 410. Under prosecution under final statute for soliciting sale of liquors *held*, intoxicating liquors are a legitimate subject of commerce and burdens thereon cannot be justified under the police power of the state. *Ex parte Loeb*, 72 Fed. 657 (S. C.). In New Hampshire a similar statute was declared void as being a regulation of interstate commerce without the consent of Congress. *Durkee v. Moses*, 23 Atl. 793 (N. H.).

COMMON CARRIER—LIABILITY OF OWNER OF PASSENGER ELEVATOR.—EDWARDS V. MANUFACTURER'S BUILDING CO., 61 ATL. REP. 446 (R. I.).—*Held*, that a landlord who maintains an elevator in his private building for the use of tenants and their employees and customers is not a common carrier, and hence is not bound to the same degree of care required of a common carrier, but only to exercise reasonable care for the safety of persons using the elevator, thus following the doctrine as laid down by the New York courts. *Griffin v. Manice*, 59 N. E. Rep. 925.

CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACT.—KNOXVILLE WATER COMPANY V. MAYER OF CITY OF KNOXVILLE, 26 SUPREME COURT REP. 224.—*Held*, that an agreement by a municipality to give a water company an exclusive franchise of thirty years, as against any other person

or corporation, is not impaired by the establishment by the municipality of its own independent system of water-works under subsequent legislative authority.

CONSTITUTIONAL LAW—LABOR LAWS—POLICE POWER—FREEDOM OF CONTRACT—*PEOPLE V. WILLIAMS*, 100 NEW YORK SUPPLEMENT, 327.—*Held*, that a statute prohibiting any female from being employed, permitted or suffered to work in any factory in the state, before six o'clock in the morning or after nine o'clock in the evening of any day, etc., was not a valid exercise of police power in the interest of the health of female employees and the public welfare, but was an unconstitutional infringement on the female's liberty to contract for her own labor guaranteed by statute.

This point, with regard to the hours within which a female may work, seems never to have arisen in this country, the general rule being, however, that legislation in regard to the number of hours during which women or children may work is a valid exercise of police power. *Commonwealth v. Hamilton Manufacturing Co.*, 120 Mass. 383. Approved in *Holden v. Hardy*, 169 U. S. 366. It is said that the restrictions upon the employment of women in underground or night work are generally accepted as sanitary regulations in the interest of morals and decency. *Freund's Police Power*, 121.

The police power of a state, however, is not subject to any definite limitation but is co-extensive with the necessities of the case and the safeguard of the public interests. *Camfield v. U. S.* 167 U. S. 518. See Comment, *supra*.

CONTRACTS—RESCISSION—WAIVER OF GROUND.—*ST. REGIS PAPER CO. V. SANTA CLARA LUMBER CO.*, 78 N. E. 701. A contract by defendant to deliver pulp-wood to a paper company bound the company to make advances to defendant during the progress of the work of cutting and hauling the wood not exceeding its cost. Defendant notified the company of its intention to rescind the contract unless the requests for advances were complied with, but continued to take the money, less that the cost of the wood by one-third, which the company thereafter advanced.—*Held*, that the receipt of the money operated to abrogate defendant's right to rescind. Gray, J., *dissenting*.

While a party to a valid contract cannot rescind at pleasure, *Bowman v. Ayers*, 2 Idaho 465, nevertheless, a party has the right to rescind a contract entirely where there has been a material breach by the other party to the contract. *Pollock on Contracts*, Third Edition, page 334; *Allen v. Webb*, 24 N. H. 278. A party who is entitled to repudiate a contract, and who wishes to rescind it, must do so distinctly and unequivocally. He cannot treat the contract as binding and rescinded at the same time. *Weeks v. Robie*, 42 N. H. 316. If he negotiates with the party, after knowledge of the breach, and permits him to proceed in the work, it is a waiver of his right to rescind the contract. *Lawrence v. Dale*, 3 Johns. Ch. 23.

CONVEYANCING—CONSTRUCTION OF DEED OF MINERALS.—*GRIFFIN V. FAIRMONT COAL CO.*, 53 S. E. REP. 24 (W. VIRGINIA).—*Held*, that a deed conveying the coal under a tract of land, together with the right to enter upon and under the land to mine the coal, does not contain any implied reservation that sufficient coal must be left to support the surface but that the grantee is entitled to take away all of the coal and allow the surface to collapse. Paf-

fenbarger, J., *dissenting*. See Comment, YALE LAW JOURNAL, Vol. XVI, page 48.

**COPYRIGHTS—WHAT CONSTITUTES INFRINGEMENT.—SAMPSON & MURDOCK Co. v. SEAVER-RADFORD Co.**, 140 FED. 539.—*Held*, that a person's action in copying names and addresses from complainant's city directory, verifying these by sending canvassers to the addresses given and afterwards publishing unchanged such information as was found to be correct, was an infringement.

**CORPORATIONS—FOREIGN CORPORATIONS—NOTICE TO ATTORNEYS.—STATE EX INF. HADLEY ATTY. GEN. v. STANDARD OIL Co., OF IND. ET AL.** 91 S. W. (MO.) 1062.—*Held*, that notice to an attorney of record is notice to the client in proceedings against a foreign corporation.

This doctrine was established to avert the evils resulting from the operation of the contrary view. *St. Clair v. Cox*, 106 U. S. 350. Under this view foreign corporations could not be sued. *McQueen v. Middleton Mfg. Co.*, 16 Johnson (N. Y.) 5. Attachment upon property within the court's jurisdiction was the only remedy. *Robb v. Chicago & Q. R. Co.*, 47 Mo. 540; *Andrews v. Mich. Cen. R. R. Co.*, 99 Mass. 534. With the great increase in the number of corporations the federal court in Massachusetts revoked the state practice. *Hayden v. Androscoggin Mills*, 1 Fed. 93. This view has been followed subsequently: *Eureka Lake Co. v. Yuba County*, 116 U. S. 410; though not universally. *Williams v. Iron Bolt B. & L. Ass'n.*, 131 N. C. 267. Under this doctrine the state may prescribe its own conditions for service of process upon foreign corporations. *Van Dresser & Oregon Ry. & Nav. Co.*, 48 Fed. 202; and by doing business such corporations waive their rights to object. *Merchant's Mfg. Co. v. Grand Trunk R. Co.*, 13 Fed. 358. A rule contrary to the one as stated in the principal case has been held. *Thatch v. Continental Traveler's Mutual Accident Ass.*, 114 Tenn. 271.

**CORPORATIONS—STATUTORY LIABILITY OF STOCKHOLDERS—ENFORCEMENT IN OTHER STATES.—CONVERSE v. AETNA NAT. BANK**, 64 ATL. 341 (CONN.).—*Held*, that by purchasing stock in a corporation the stockholder incurs a liability to perform such contractual obligations as are attached by the laws of the corporation's domicile to the ownership of its capital stock, statutory liabilities imposed upon stockholders being such contractual obligations. *Hammersley, Case, JJ.*, *dissenting*.

This decision is in harmony with the present tendency in most jurisdictions towards a liberal enforcement of the statutory liabilities of stockholders in a corporation created under the laws of another state. Most states enforce these statutory liabilities, imposed upon stockholders by the laws of another state, under the head of contractual obligations. *First Nat. Bank, of Deadwood v. Gustin Minerva Consolidated Mining Co.*, 42 Minn. 327. Former decisions inclined to construe such statutes as penal in their nature, and hence, were extremely reluctant to enforce them. *Sayles v. Brown*, 4 Fed. 8. The courts of a few states still refuse to countenance their enforcement. *Crippen v. Lighton*, 69 N. H. 540. All courts hold that a special remedy is exclusive and the liability imposed by such a statute will not be enforced in another state, where such remedy is not afforded by the law of such other state. *Russell v. Pacific Railway Co.*, 113 Cal. 258. Nor will such a statutory obligation be enforced when a suit in equity would be necessary to adjust the claims of the various parties. *Bates v. Day*, 198 Pa. State 513.

CORPORATIONS—LIABILITY FOR SLANDER.—*SAWYER v. NORFOLK & S. R. Co.*, 54 S. E. 793 (NORTH CAROLINA).—*Held*, that a corporation may be liable for slander committed by its agent or employee.

Slander is oral defamation published without legal excuse. Defamation is understood to be a false publication calculated to bring one into disrepute. Publication in a legal sense is when the defamation is put before one or more third persons. *Cooley on Torts*, 225. The rule regarding liability of a corporation for a tort is the same as applies to an individual. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 2 Sup. Ct. 719. A corporation can be held liable for slandering another corporation. *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 42 Hun. 153. *Contra*. "However, it seems to have been held in many early cases that a corporation could not be liable as it had to act through its agents or officers. *Townshend on Libel and Slander*, 474. The weight of authority now is that "while it is true that a corporation cannot itself speak and therefore cannot itself slander, neither can a corporation itself make false representations and yet a corporation may be liable for false representation of its agents for the same reasons; it may be liable for slander." *Marshall on Corporations*, 311, note 16.

CRIMINAL LAW—WITNESSES—WEIGHT OF TESTIMONY.—*GORDON v. STATE*, 41 SOUTH. 848 (ALA.).—*Held*, that an instruction in a criminal case that the jury should be very "cautious and careful" in weighing the testimony of a child who had testified, was properly refused as invoking the province of the jury.

It is primarily and generally conceded that the charge should be entirely free from intimating any opinion as to the weight of evidence, *Rawles v. State*, 97 Ga. 186; *Andrews v. People*, 60 Ill. 354; and the charge is error if an opinion to the jury is expressed as to the credibility of witnesses. *Commonwealth v. Barry*, 91 Mass. 276; *Ross v. State*, 29 Tex. 499. Likewise in case of a wife, who testified in favor of husband, it is error for the judge to instruct jury that the testimony should be received with "great caution" or evidence "entitled to great weight" or that it should be examined with "peculiar care." *State v. Guyer*, 6 Iowa 263; *Steele v. State*, 83 Ala. 20; *State v. Bernard*, 45 Iowa 234. Whether the evidence is strong or slight is in the province of the jury, *People v. Ah Sing*, 59 California 400; though, in the Federal Courts an expression of opinion by the court as to the weight of evidence is permissible. *Allis v. United States*, 155 W. S. 117. Still the jury as judge of facts rule is occasionally limited by allowing comments on the evidence, so long as such comments do not amount to a direction or advice as to how the jury shall decide the facts to which the evidence relates. *State v. Duffy*, 57 Conn. 525.

CRIMINAL LAW—RIGHTS OF ACCUSED TO BE CONFRONTED BY WITNESS.—*RALPH v. STATE*, 52 S. E. 298 (GA.).—*Held*, that where the accused in a criminal prosecution is deaf, the court should permit the evidence of the witnesses to be communicated to him in some manner. The trial court was not in error for refusing to postpone the trial until an expert typewriter could be obtained to take evidence on the machine as it was given, but the requirements of the Constitution were satisfied by the action of the court in allowing counsel for the accused to write down the testimony as the trial progressed and allowing accused to read it.

**CRIMINAL LAW—EVIDENCE—CHARACTER.—PEOPLE v. PELSARZ**, 78 N. E. 294 (N. Y.).—*Held*, where there was no evidence offered as to the character of defendant, accused of felony, he was not entitled to an instruction, that the presumption that his character was good must be considered by the jury.

The general rule in the United States and England is that in criminal cases there is a rebuttable presumption in favor of the prisoner's innocence. *Tweedy v. State*, 5 Iowa 433; *Horne v. State*, 1 Kan. 2. And the felon may always put witnesses in evidence to prove his general character. *Roscoe's Crim. Law Evidence*, 196. Until then the state cannot attack his character; nor even then, examine the defendant as to particular facts of his prior character. *State v. Tosier*, 49 Me. 404. However, when he does not offer evidence of his character, the law assumes that it is of ordinary fairness and the jury cannot assume that it be good or bad but must give a verdict solely on the evidence presented. *Danner v. State*, 54 Ala. 127; *State v. Kabrick*, 39 Ia. 277. So in this case, the prisoner's prior character is immaterial and the jury cannot assume that it is bad and thus infer that he is guilty of the crime charged. *Ackley v. People*, 9 Barb. 606; *State v. Dockstader*, 42 Ia. 436. His former good character offers no presumption of his innocence. *People v. Lee*, 81 Pa. 969; *People v. Griffith*, 146 Cal. 339. But where the prisoner's general character is in issue his character evidence may go to the jury though it be of little avail. *McKelvey on Evidence*, 153. It is sometimes held that if the act is of an atrocious nature such evidence is of no avail. *People v. Mead*, 50 Mich. 228. This doctrine is generally disapproved in United States. *McKelvey on Evidence*, 153. Moreover, in such cases, if there is doubt in the jury's mind, their verdict should be for the defendant. *U. S. v. Means*, 42 Fed. 599; *Walker v. State*, 136 Ind. 663.

**DAMAGES—BREACH OF CONTRACT—ERROR IN LOCATING HOUSE.—OKEN v. HENDERSON**, 99 N. Y. SUPP. 917.—*Held*, that where a contractor did not construct a house on the lines specified in the plans, the measure of damages was the difference between the value of the property as it was and as it would have been, if the house had been constructed according to contract. Hooper, J., *dissenting*.

The employer should have such deduction made from the contract price as will be equal to the difference between the value of the work agreed to be done and the work actually accomplished. *Luth on Damages*, Vol. II, p. 1611. In England, however, it was held that, what plaintiff is entitled to recover, is the price agreed upon in specifications subject to a deduction, the measure of which is the sum which it would take to make the work correspond to the specifications. *Thortonon v. Place*, 1 Mood & Rob. 218. Iowa follows this rule. *Smith v. Bristol*, 33 Iowa, 24. The latter rule is repudiated, however, in many American jurisdictions on the ground that its application would, in many cases, involve reconstruction as unreasonable and disproportionate expense and the dictum of this case is followed. *White v. MacLaren*, 151 Mass. 553; *Fagan v. Whitcomb*, 14 S. W. 1018 (Tex.); *Morton v. Harrison*, 52 N. Y. Super. Ct. (20 Janis & S.) 305.

**EMINENT DOMAIN—USE OF HIGHWAY FOR TELEPHONE LINE—INJUNCTION.—HOBBS v. LONG DISTANCE TELEPHONE & TELEGRAPH CO.**, 41 SOUTHERN REP. 1003 (ALABAMA).—*Held*, that a telephone line along the margin of a highway is not an additional burden, entitling the abutting owner to compensation. Even if the abutting owner on a highway is entitled to compensa-

tion for the cutting of trees thereon in the construction of a telephone line, his remedy at law is adequate, and he is not entitled to injunction.

**EVIDENCE—PRIVILEGES—RIGHT OF JURY TO DRAW INFERENCE—FROM REFUSAL OF PARTY TO WAIVE PRIVILEGE.**—*PENN. R. R. CO. v. DURKEE*, CIRCUIT COURT OF APPEALS (JULY 24TH, 1906).—*Held*, that in an action for damages for injuries to the person, the trial judge properly refused to charge the jury that they might infer from the plaintiff's refusal to waive her privilege, and allow her physician to testify as to her condition, that such testimony would have been unfavorable to her, or in fact to make any inference at all.

**EVIDENCE—WITNESSES—IMPEACHMENT—CONTRADICTORY STATEMENTS—STATEMENTS CONSISTENT WITH TESTIMONY.**—*BURKS v. STATE*, 93 S. W. 983 (ARKANSAS).—*Held*, that where a witness has denied having made statements contradictory of his testimony, and evidence of contradictory statements is admitted, former statements of his consistent with his testimony are not admissible to support him, in the absence of proof of change in the circumstances or relations which might have prompted a recent fabrication or design to misrepresent the facts. See Comment *ante*.

**EVIDENCE—CREDIBILITY OF WITNESS.**—*ELECTRIC FIREPROOFING CO. v. SMITH*, 99 N. Y. SUPP. 37.—*Held*, that the credibility of a witness need not be submitted to the jury when his evidence is not contradicted directly nor by legitimate inference and is not improbable, surprising, or suspicious. Houghton, J., *dissenting*.

The general rule is that the question as to whether testimony is credible or not and to what extent it is so, is the exclusive province of the jury. *Hammill v. R. R. Co.*, 93 Ky. 343; *White v. Ross*, 35 Fla. 377. If the court submits the credibility of the undisputed testimony of a witness to the jury, it is error for which a higher court may set the verdict aside. *Denton v. Carroll*, 4 N. Y. App. Div. 535. But where evidence between witnesses is in any way conflicting it is the province of the jury to determine its credibility. *Fuerty v. Fritz*, 6 Col. 137. Under what circumstances the trial court may assume a question of fact to exist concerning which there is no conflict in the practice seems to be to submit to the jury all questions of fact not expressly admitted. *Gay v. Tielkemeyer*, 64 Mo. App. 112. Whether the testimony of a witness is suspicious is a question for the jury in some states. *VanVatter v. McKillip*, 7 Blackf. (Ind.) 578.

**EVIDENCE—EXPERIMENTS.**—*TACKMAN v. BROTHERHOOD OF AMERICAN YEOMAN*, 106 N. W. 350. Where in an action in a mutual benefit certificate providing that defendant should not be liable if the member committed suicide, the evidence showed deceased was found dead in his stable strangled and suspended in a partially sitting posture by a portion of a bridle hanging on a peg on which harness was usually hung, *held*, evidence of experiments showing that, if a bridle was hung in the ordinary manner on the peg in question, a person of the same height and weight as deceased would, if he fell with his head in a loop formed by a strap of the bridle, be caught and strangled if he did not regain his balance, was admissible.

In general it is permitted to show in proof of an alleged fact, that a result similar to the fact in question was obtained from an experiment performed

under conditions substantially similar to those admitted or proved to exist. *Collins v. People*, 194 Ill. 506. The test of admissibility is—Will it aid rather than confuse the jury? *Burg. v. Chic. R. I. & P. R. R. Co.*, 90 Ia. 106. The question of admissibility is one necessarily resting largely in the discretion of the trial judge. *State v. Smith*, 49 Conn. 376. But where experiments are relevant to the matter in issue and would tend to help the jury, exclusion is reversible error. *Farmer's & Mer. Bank v. Young*, 36 Ia. 44. Experiments must not be of an uncertain nature. *Ulrich v. People*, 39 Mich. 245. So it was inadmissible to show that two bloodhounds of the same breed as those used in tracking the supposed criminal, when put on the trail of a human being, had left it to follow the trail of a sheep. *Simpson v. State*, 11 Ala. 6.

EVIDENCE—DECLARATIONS—RES GESTÆ.—*BAKER v. DRAKE*, 41 SOUTH, 845 (ALA.).—*Held*, that the rule, that declarations of a party in actual possession of property asserting title in himself are admissible in evidence as part of the *res gestæ*, explanatory of the possession, does not extend to his declarations as to the history and source of such title.

The above rule applies equally to real or personal property. *Ray v. Jackson*, 90 Ala. 513. But the rule has not gone so far as to allow an agent's declaration as to the ownership of property in his possession. *Standefer v. Chisholm*, 1 Stew. and P. 449 (Ala.). The present owner's declarations against his title are admissible but not for the purpose of supporting his title or that of those under him or to contradict the witnesses of the other side. *gestæ*. *Roebke v. Andrews*, 26 Wis. 311; *Howell v. Hyack*, 2 Abb. Dec. 423; *Turner v. Belden*, 9 Mo. 797. Since possession is presumptive evidence of title, the declarations of the possessor made during the continuance of possession, may be put in evidence to explain the character of his possession when the title is in controversy and even declarations qualifying the possession of property, at the time of its sale, are admissible as a part of the *res* likewise as to the present possessor's declaration as that he holds it in his own right or as tenant or as trustee. *Thomas v. Wheeler*, 47 Mo. 363.

FOOD—REGULATING SALE OF BUTTER—CONSTITUTIONAL LAW.—EX PARTE DIETRICH, 84 PAC. 770 (CAL.). Act requiring packages of butter offered for sale to be marked with their exact weight.—*Held*, not to be a valid exercise of the police power, but is unconstitutional as being a restriction on the right to property and privilege of following a lawful business.

The exercise of the police power must be reasonable. *Chicago v. Rumpff*, 45 Ill. 90. A law which interferes with property by hampering the owner in purposes of trade and commerce is unconstitutional and void. (A law requiring certain goods to be marked "convict-made.") In this case the required mark, itself, was detrimental. *People v. Hawkins*, 157 N. Y. 1. The police power is properly exercised in regulation of manner and sale of articles, by such requirements as will tend to insure against fraud and injury. *State ex rel Atty. Gen. v. Capitol City Dairy Co.*, 62 Ohio St. 350. Statute prohibiting sale of imitation butter unless colored pink has for its object the prevention of fraud and is constitutional. *Pierce v. State*, 13 N. H. 536. Rules for the conduct of most necessary and common occupations are prescribed, when from their nature, they afford peculiar opportunities for imposition and fraud. *Cooley, Const. Lim.*, 5th ed. 743. Where act provides for marking of packages containing oleomargarine, a city cannot grant a license



to sell without so marking, apparently therefore upholding the validity of such a provision. *Haines v. People*, 7 Colo. App. 467. Legislature has the power to pass such laws as it may deem necessary to prevent deception and fraud. *People v. Arensburg*, 105 N. Y. 123.

LEGISLATION—RIGHT OF STATE TO CONTROL SPECULATION IN THEATER TICKETS.—*EX PARTE QUARG*, 84 PAC. 766 (CALIFORNIA).—*Held*, that a statute, prohibiting any person from selling tickets to theaters or other public places of amusement for a higher price than that originally charged by the management, is in conflict with the State Constitution which secures every person the right of "acquiring, possessing and protecting property" and therefore void. See Comment *ante*.

MANUFACTURERS—LIABILITY FOR DEFECTS IN ARTICLES MADE—WHO MAY SUE.—*WATSON V. AUGUSTA BREWING COMPANY*, 52 S. E. 152 (GA.).—Action to recover, from defendant, damages for injuries resulting from the swallowing of glass which the defendant had bottled up with a beverage, which he advertised as harmless and refreshing. Defendant contended that he was not liable because there was no privity of relationship between the parties, inasmuch as the beverage had not been sold directly by the defendant to the plaintiff.—*Held*, that the defendant is liable on the ground that he has violated a duty owed by him to the general public.

MASTER AND SERVANT—RAILROADS—ASSUMED RISKS.—*PHIPPIN V. MISSOURI PAC. R. CO.*, 93 S. W. (Mo.) 410.—*Held*, that where a switch-tender whose duty is to line switches so as to prevent the cornering of cars, fails to perform that duty properly, and plaintiff, whose duty is to couple such cars, is injured thereby, that plaintiff did not assume such risks, but that the negligence is that of the master.

This case shows a further limitation on the fellow-servant rule as established in *Murray v. S. C. R. Co.*, 36 A. D. (S. C.) 268 (1841) to the effect that an employer contracts with a view to all ordinary risks. This doctrine was followed in *Farwell v. Boston & Worcester Ry. Co.*, 38 A. D. (Mass.) 339, and have been adopted as the general rule. *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478. With the great increase in the relationships of master and servants the hardships of the rule became apparent and statutory changes have been adopted in the various states; Colorado alone having wholly abandoned the rule. Acts of 1893, section 5. This change in Missouri was by a process of paring down the general rule, first, so as to recognize degrees of subordination among servants; *Moon v. Wabash, St. L. & P. R. Co.*, 85 Mo. 588, then reasonable care as to general conditions of employment; *Soeder v. St. Louis, I. M. & S. R. Co.*, 100 Mo. 673, and finally by statute as followed in the principal case by the exemptions as to railroads was abolished.

MASTER AND SERVANT—RAILROADS—DEFECTIVE TRACK.—*ST. LOUIS, I. M. & S. RY. CO. V. MIZE*, 95 S. W. 488 (ARK.).—*Held*, that a railroad company is under no obligations to its employees to repair its track provided due notice is given of such defect. Battle, J., *dissenting*.

This ruling is based on the doctrine as expressed by the maxim. *Volenti non fit injuria*; *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135; the interpretation of which has given rise to two schools. *Walsh v. Whildey, L.*

R., 21 Q. B. Div. 371. One is based on the implied contract from the servant's election to expose himself. *Gleason v. New York & N. E. Ry. Co.*, 159 Mass. 68; *Bonnet v. G. H. & S. A. Ry. Co.*, 89 Tex. 72. The other recognizes the inequality arising from the greater disadvantage of the servant. *Fitzgerald v. Conn. River Paper Co.*, 155 Mass. 155. The latter was applied to virtual compulsion; *Brasil Black Coal Co. v. Hoadlet*, 129 Ind. 327. Later this has been reduced to physical compulsion; *Eldridge v. Atlas S. S. Co.*, 134 N. Y. 187; and therefore leaves the former as the prevailing doctrine. But some courts have held *contra* to the rule as decided in the principal case. *McKee v. C. R. I. and P. Ry. Co.*, 83 Iowa 616.

MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.—*ROCCO v. F. A. GILLEPSIE CO.*, 64 ATL. 118 (N. J.) A servant was injured while engaged in the excavation of a trench.—*Held*, that when the obvious danger increases as the work advances and the servant may protect himself and is injured through his failure to do so, the master is not liable.

The points embodied in this case are luminous for the purpose of illustrating the minute discriminations which the courts are inclined to make between cases arising under the broad maxim, *Volenti non fit injuria*, reinforced by the specific rule that a servant cannot recover for injuries resulting from obvious risks freely accepted. *Fitzgerald v. Conn. River Paper Co.*, 155 Mass. 155. One of the most material variations of this rule is that the risks incurred must have been of such a nature as to have been readily perceived and easily understood. *Dean v. Saint Louis Woodenware Co.*, 80 S. W. 292 (Mo.). In particular are these nice distinctions discernible in cases like this one, analogously decided, where the injuries were incurred during the progress of work in tunnels or excavations. The caving in of a completed portion of a tunnel or excavation is not one of the risks assumed by a servant. The permanently completed portion of such a tunnel or excavation is an appliance and must be kept in safe and proper condition by the master. *Hanley v. California Bridge and Construction Co.*, 47 L. R. A. 597 (Cal.). Where, however, the place of work is constantly changing, furnishing a fit and safe place to work, is a part of the work itself and is one of the ordinary risks assumed by the servant. *Coal & Mining Co. v. Clay*, 51 Ohio State

MASTER AND SERVANT—OBVIOUS DANGERS—ASSUMPTION OF RISKS BY UNION.—*MOSS v. MOSLEY*, 41 S. 1012 (ALA.).—*Held*, that a boy between thirteen and fourteen years old, assumed obvious risks, when directed by the defendant's intestate to clean up about a machine, though he had worked at the brickyard only a short time, and this was not his regular job, and no action for his death would lie. Denson, J., *dissenting*.

The weight of authority in the United States is that the master must use due diligence in selection of all servants. *Whittaker v. Delaware, etc., Ry.*, 126 N. Y. 544; *Parke v. N. Y. Cent. Ry.*, 155 N. Y. 215. Some courts allow evidence to show incompetence. *Huffcut on Agency*, p. 352, note 4. Ordinarily a minor employee has no greater right of action than an older person under the same circumstances. *Gilbert v. Guild*, 144 Mass. 60; *McGinnis v. Canada So. Bridge Co.*, 49 Mich. 466. Few courts hold that it is not the employer's duty to instruct a servant, unless information is asked, or that the latter is known to be inexperienced. *No. Pac. Ry. v. Watts*, 63 Texas 549; *Costello v. Judson*, 21 (Hun.) N. Y. 396. A minor assumes obvious risks of his employment. *Mineral Ry. v. Marcus*, 195 Ala. 389. His fear of dis-

charge is not coercion. *Sweeney v. Berlin Co.*, 101 N. Y. 20. *Contra, Mason v. Richmond Ry.*, 111 N. C. 482. Mere employment of a minor about dangerous work is not negligence *per se*. *Penn Co. v. Long*, 94 Ind. 250; *Texas, etc., Ry. v. Charlton*, 60 Tex. 397. Infancy in and of itself does not preclude his assumption of risks. *De Graff v. N. Y. Cent. Ry.*, 76 N. Y. 125. Yet if his judgment is so immature as to be unable to comprehend the danger of the machine, the employer would be liable. *Taylor v. Wootan*, 1 Ind. 188; *Goins v. Chicago, etc., Ry. Co.*, 37 Mo. App. 221.

NEGLIGENCE—MAINTENANCE OF TURNTABLE BY RAILROAD—LIABILITY.—*WALKER'S ADM'R v. POTOMAC, F. & P. R. Co.*, 53 SOUTHEASTERN REP. 113 (VIRGINIA). This case repudiates the turntable doctrine as established in most states, inasmuch as it holds that, under the common law rule that a landowner owes no duty to a trespasser, a railroad company is guilty of no negligence in maintaining an unlocked turntable on its premises at a distance of from fifty to three hundred feet from public land, and hence, is not liable for an accident causing the death of a child twelve years of age who trespassed upon such ground.

PRINCIPAL AND AGENT—IMPLIED CONTRACT—KNOWLEDGE OF AGENT.—*BLOWER v. SOUTHERN RY. CO.*, 54 SO. E. 368 (SO. CAROLINA).—*Held*, that if a mail messenger for the government transfers mail, which is the duty of the railway company while thinking that he is doing government work, and the general agent of said railway company accepts the benefits of his labor, with knowledge of the mistake, such company is liable for the reasonable value of the work done.

If a person allows another to work for him under such circumstances that no reasonable man would suppose that the latter was doing it for nothing, he will be liable on an implied contract. *Day v. Caton*, 119 Mass. 513; *Huck v. Flentze*, 80 Ill. 258. The doing of the work is an offer; the acquiescence in its being done is the acceptance. *Clark on Contracts*, 2nd Ed. 15. The implication is merely one of fact. *Pol. Cont.*, 9; *Leake on Cont.*, 11. One cannot recover for labor voluntarily performed for another under no express nor implied promise to pay. *De Montague v. Bacharach*, 187 Mass. 128; *Watkins v. Richmond College*, 41 Mo. 302. As a general rule mere silence does not constitute a ratification of agency. *Royal Ins. Co. v. Beatty*, 119 Pa. St. 6. Where, however, special circumstances and good faith require a man to speak and he does not, he is thereafter estopped to deny the agency. *Huffcut on Agency*, 49. Moreover, such principal must ratify the transaction *in toto*. *Mundorff v. Wickersham*, 63 Pa. St. 87; *Eberts v. Selover*, 44 Mich. 519. This principle also applies where the agent, alone, has knowledge of such material facts. *Hyatt v. Clark*, 118 N. Y. 563; *Satterfield v. Maloné*, 35 Fed. 445.

POWERS—SALE OF LAND—AUTHORITY OF ONE TRUSTEE.—*HILL ET AL v. PEOPLE*, 95 S. W. 990 (ARK.).—*Held*, when land was devised by testator to three trustees, with full power to sell and carry same, the concurrence of two of the trustees was essential to the validity of a sale under the power.

Testator has power to require a power of sale to be exercised jointly by the executors and trustees and such intention must be given full force and effect. 80 Md. 454. When authority to sell land is given all the acting

executors living at the time must join in the sale, 3 Day 384.

When a deed was executed by two executors during the lifetime of third and it did not appear that he had given his assent, the deed was held ineffectual as a conveyance. 9 N. Y. S. 389.

General opinion seems to be where one executor acts and it is expressly or impliedly assented to by the others it is valid. *Bonus v. Drake*, 50 N. C. 153; *Silverthorn v. McKinister*, 12 Pa. (2 Jones) 67; *Dunn's Ex'rs v. Renick*, 40 W. Va. 549.

RAILROADS—PUBLIC HIGHWAYS—SHIFTING OF CARS.—*LONG v. MISSOURI PAC. RY. CO.*, 91 S. W. (Mo.) 1012.—*Held*, that "shunting" cars and "flying the switch" across public highways without warning is negligence, *per se*.

This doctrine is by no means settled. Some jurisdictions hold that it extends to trespassers where there is no public highway. *Patton v. East Tenn., V. & G. R. Co.*, 89 Tenn. 370. *Contra*,—*Wright v. Boston & A. R. Co.*, 142 Mass. 396. The general rule seems to be that the question of negligence is to be left to the jury. *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469; *Chicago, R. I. & P. R. Co. v. Digman*, 56 Ill. 487. Some jurisdictions hold that contributory negligence on the part of the traveler does not preclude his right of recovery. *Penn R. Co. v. McGirr*, 61 Md. 108. *Contra*,—*Haley v. N. Y. Central & H. R. R. Co.*, 7 Hun. 84.

RAILROADS—INJURIES TO PEDESTRIANS—LIABILITY TO TRESPASSERS.—*BROWN v. BOSTON & M. R. R.*, 64 ATL. 194 (N. H.). A trespasser, an old and partially deaf woman, while walking on defendant's track was killed by an express train. Neither engineer nor fireman saw trespasser on the track. *Held*, that a railroad company is liable for negligently killing deceased while she was walking by the track, even though she was a trespasser, providing she was in the exercise of due care and the defendant's servants failed to exercise due care to discover her presence in such a situation, when circumstances existed which would have put a person of average prudence on inquiry. Young, J., *dissenting*.

There seems to be no other decided case which carries to such an extent the doctrine promulgated by this case. On the other hand, the weight of authority is to the contrary. The well settled general rule is that railroads are liable for injuries to trespassers only when the railroad has been guilty of gross negligence. *Western & A. R. R. v. Meigs*, 74 Ga. 857; *Richmond & D. R. Co. v. Tay*, 106 N. C. 404. This rule is usually construed to mean that the trespasser in order to recover must show that the persons in charge of the train saw him and after seeing him failed to exercise reasonable diligence to prevent the injuries. *Gherkins v. Louisville & N. R. Co.*, 30 S. W. 651 (Ky.). Another class of cases holds that the only duty a railroad company owes a trespasser is to refrain from wantonly and wilfully injuring him. *Ill. Cent. R. R. v. Eicher*, 202 Ill. 556.

RAILROADS—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.—*SANGUINETTE v. MISS. RIVER, ETC., RY. CO.*, 95 S. W. 386 (Mo.).—*Held*, where a person, familiar with the railroad crossing, was being driven in a vehicle by another, but did not look for an approaching train, he was guilty of contributory negligence as a matter of law and an action for his death would not lie.

In the absence of statute, the general rule in the United States is that there is no presumption of negligence on the part of a railroad company for an injury to a non-passenger. *Cooley on Torts*, 2nd Ed., p. 797. The care required by the latter, however, is such as an ordinarily prudent man would exercise under like circumstances. *Phila. R. R. Co. v. Publes*, 67 Fed. 591; *Wilds v. Hudson River R. Co.*, 29 N. Y. 315. But in the application of this rule the courts are somewhat in conflict. Most courts hold that it is sufficient to look in both directions for an approaching train. *Rodrian v. N. Y., etc., R. R. Co.*, 125 N. Y. 526; *Chicago B. & G. R. Co. v. Van Pattern*, 74 Ill. 91. The Federal Courts agree that the traveler must stop, also *Dunning v. Bond*, 38 Fed. 813. The fact that the occupant of a vehicle is driven by another does not relieve him. *Durkee v. Delaware & H. Canal Co.*, 88 Hun. 471; *Dean v. Penn. R. Co.*, 129 Pa. 514. Many states hold that where a crossing is particularly dangerous, the degree of care is more imperative. *Thomas v. Delaware L. & W. R. Co.*, 8 Fed. 729. *Wilas v. Hudson River Co.*, 29 N. Y. 315. Missouri formerly held that it was not necessary to "stop, look and listen." *Zimmerman v. Hannibal St. J. R. Co.*, 71 Mo. 476. The weight of authority to-day is that this is not negligence *per se*, but is only evidence thereof. *Terre Haute I. R. Co. v. Voelker*, 129 Ill. 540; *Winslow v. Boston & A. R. Co.*, 11 N. Y. 83.

REORGANIZATION OF MUTUAL INSURANCE COMPANIES.—*HUBER v. MARTIN*, 105 N. W. 1031 (WISCONSIN).—*Held*, that a statutory scheme for the reorganization of a mutual insurance company and the transfer of its assets, including an accumulated surplus, to its successor, is in conflict with the constitutional inhibition against laws impairing the obligation of contracts and in violation of the provisions of the Federal Constitution as to the equal protection of the laws and the deprivation of property without due process of law.

SECURITIES—SALE OF PLEDGED STOCK—*CONTENT v. BANNER*—76 N. E. 913 (N. Y.).—*Held*, that where a stockbroker advances all the money and buys securities for a customer, a written notice to the customer to take up the securities so bought, or supply margins for carrying them, and stating that unless he does so before a certain date the broker will sell the stock for his account and hold him responsible for the amount, is defective, where it contains no statement as to the time or place of the sale, and that, in the absence of any agreement dispensing with notice, a sale on the "curb" constitutes a conversion though the customer has failed to respond on the date stated.

TORTS—MASTER AND SERVANT—EMPLOYER'S LIABILITY TO SERVANT.—*BANNON v. N. Y. CENT. & H. R. R. Co.*, 98 N. Y. SUPP. 770. While one acting as foreman attempted to move a tie across the railroad track, a train struck the tie and injured a member of the crew.—*Held*, that the foreman was then acting as a fellow-servant and that the employer was not liable to the workman for his negligence under employer's Liability Act, Laws 1902, p. 1748, c. 600. Law recognizes that employee may have two duties; those of a superintendent and those of an ordinary workman. *Kellard v. Rooke*, 192 B. D. 585; *Cushman v. Chase*, 156 Mass. 342. If the act is within the duty of a servant, the one doing it, regardless of his rank, is a fellow-servant of the one injured by its negligent performance. *Geoghegan v. Atlas S. S. Co.*, 146 N. Y. 369;

*The Deep Mining & Drainage Co. v. Fitzgerald*, 21 Col. 533; *Fitzgerald v. Houkomp*, 44 Ill. App. 365. A workman cannot recover from his employer for an injury caused by the negligence of the foreman or superintendent in the performance of such work as properly pertains to a servant. *Stockmeyer v. Reed*, 55 Ala. 259.

There is a minority doctrine that although the character of the act may be that of a fellow-servant, the master is liable to the servant for an injury caused by the act of the foreman. *Texas & P. Ry. Co. v. Miss.*, 243 S. W. 328; *Russ v. Wabash Western Ry. Co.*, 112 Mo. 45.

TELEGRAPHS—DELAY IN DELIVERING MESSAGE—WHAT LAW GOVERNS.—*WESTERN UNION TEL. CO. v. LACER*, 93 S. W. 34 (KY.).—*Held*, that the liability of a telegraph company for delay in delivery of a message sent from one state into another, is governed by the law of the state in which the message is sent, though the mistake which caused the delay was made by an agent of the company in the other state.

The fact that the initial and terminal points of a message sent by telegraph are not in the same state is not material in an action against the company to recover damages for a breach of its common law duty to use proper care to effect a prompt and correct transmission and delivery. *Western Union Tel. Co. v. Mellon*, 96 Tenn. 66. There is a proper distinction drawn between an action brought to recover a penalty and an action brought to recover damages, for a mistake made in another state. If the action is brought to recover a penalty, it will fail as the penal laws of a state do not extend beyond its boundaries. *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347. On the other hand a telegraph company which undertakes to correctly transmit a message to another state is liable in the state where the message is sent for damages for breach of its contract in the other state. *Kemp v. Western Union Tel. Co.*, 28 N. C. 661.

WILLS—EVIDENCE OF UNDUE INFLUENCE—DECLARATIONS OF TESTATOR.—*WETZ v. SCHNEIDER*, 96 S. W. 59 (TEXAS).—*Held*, that declarations, made before or after the execution of the will, by a testator, are not admissible as evidence of undue influence, or of the truth of the facts stated by him, but only as manifestations of his mental condition. *James, C. J., dissenting.*

This decision points out the distinct line of cleavage between those cases which hold that declarations of the testator are admissible as evidence and the cases which hold that such declarations are not admissible, when the question of undue influence is in issue. On the one hand, such declarations are not admissible for the purpose of proving the truth of the statements they contain, whether or not these statements indicate constraint exercised upon the testator. Under such circumstances, being made before or after the execution of the will, these statements would be mere hearsay evidence. *Westfall v. Wait*, 73 N. E. 1089 (Ind.). This objection fails, however, when such statements were contemporaneous with the execution of the will, for in such case they are of course part of the *res gesta*. *Jackson v. Kniffen*, 3 Am. Dec. 390 (N. Y.). On the other hand, declarations made within a reasonable time before or after the execution of the will, are admissible, but only for the purpose of showing the condition of the testator's mind and his susceptibility to the alleged undue influence. *Lucas v. Cannon*, 76 Ky. 650; *Robinson v. Hutchinson*, 26 Vt. 38. And there must be other direct evidence of the exercise of undue influence before such declarations can be received. *In re Hess' Will*, 48 Minn. 504.

## ALUMNI AND SCHOOL NOTES.

Completed registration figures in the Law School show the considerable increase of 139 men over the previous enrollment, despite the fact that there has been a falling off this year in the attendance at other university law schools, Harvard having lost 34. The total registration, including students in other departments who elected law work, is 620. A year ago the corresponding figure was 481. This year's figures are the highest in the history of the School. The number of regular students is 289, an increase of 11 over last year. The enrollment in the First Year Class cannot be compared strictly as yet with the number given for the same class last year. The figures for the two years follow:

1905-6.		GRADUATES.		1906-7.
13	.	Third Year Class,	.	9
70	.	Second Year Class,	.	84
67	.	First Year Class,	.	83
103	.	Special Students,	.	86
25	.	Other Departments,	.	27
203				331
<hr/> 481	.	Total under instruction,		<hr/> 620

The following new appointments are announced:

Charles P. Sherman, D. C. L., Instructor in French and Spanish Codes; Macgrane Cox, B. A., of New York City, Lecturer on Bankruptcy; Gordon E. Sherman, Ph.B., Instructor in Comparative Constitutional Law and in the German Code; Edward A. Harriman, LL.B., Instructor in Comparative Administrative Law.

Debaters to represent the Law School in the University trials for the Yale-Harvard team were selected November 6th. Messrs. Slade, '07, Cosgrove, G., Maher, '07 and Whitman, '07, were picked by the judges and will represent the Law Department in the Inter-department trials. The topic under discussion was the same as that for the Yale-Harvard debate, and is as follows: *Resolved*, That further restriction of immigration is undesirable. By the further restriction of immigration is meant the application of additional tests with the object of materially diminishing the number of immigrants to the United States.

The annual reception for the students of the Law Department

was held at Dwight Hall, Thursday evening, October 18th, by the Yale Law School Y. M. C. A. President Hadley and Dean Rogers were present, each making short addresses. Charles W. Evarts, '07, was Chairman of the Reception Committee.

"Lincoln and Jefferson, exponents of the two great parties," was the interesting subject of a fine address delivered before the Kent Club and friends in Hendrie Hall, November 5th, by Judge Lyman B. Munson. Judge Munson was a member of the class of 1851 in the Law School and is therefore privileged to number himself among the three or four "oldest living graduates." He was appointed a United States judge by President Lincoln during the month previous to the latter's assassination. He was a firm and close friend of Lincoln and was well acquainted with the inside of things during the Lincoln regime.

'65.—Judge William B. Stoddard was the candidate for Attorney-General on the Democratic state ticket for Connecticut, but was defeated by the Republican nominee.

'75.—Mayor John P. Studley of New Haven was elected Judge of Probate of New Haven County on the Republican ticket.

'85.—Hon. Stiles Judson, the Republican candidate for re-election as state senator from Stamford, Conn., was returned to the capitol by an increased majority.

'93.—John Q. Tilson, was re-elected to the legislature of Connecticut, from New Haven, by a handsome majority and is being prominently mentioned as the next Speaker of that house.

'94.—George P. Breckenridge has removed his offices from No. 271 Broadway to the Mutual Life Building, Nos. 32 Liberty Street and 32 Nassau Street.

'94.—John K. Berry and G. O. Redington have formed a partnership for the general practice of law under the firm name of Redington & Berry with offices at 15 William Street, New York.

'96.—Joseph C. Sweeney has been promoted to the position of trial counsel for the New York, New Haven and Hartford Railroad Company, with offices at Providence, R. I.

'96.—Charles B. Waller, of New London, Conn., was elected on the Republican ticket as state senator from the eighteenth district.

'98.—William B. Boardman has been appointed Assistant Attorney for the New York, New Haven and Hartford Railroad



Company, with offices at New Haven, Conn. The law business heretofore conducted under the firm name of Stoddard, Marsh & Boardman will be continued under the firm name of Stoddard, Marsh & Stoddard at 164 State Street, Bridgeport, Conn.

'99 G.—Charles Henry Huberich, D. C. L., '99, who was recently promoted to an associate professorship of law in the Leland Stanford University, has been appointed Acting Dean of the Law Department of that University, during the absence of Professor Nathan Abbot, the present Dean, on sabbatical leave.

'99.—Charles H. Studin announces the removal of his law offices to No. 60 Wall Street, New York City.

'99.—The marriage of Miss Louisa Jane Gifford to Henry Manchester Boss, Jr., of Providence, took place at Christ Church, Swansea, Mass., October 20.

'99.—Ernest C. Simpson, a member of the New Haven Grays, recently won the President's individual match in the National Guard Rifle tournament at Sea Girt, N. J. There were 278 entries from all parts of the United States. The shooting was in skirmish and at varying ranges, his score being 193 points.

'99.—Charles T. Russell recently severed his connection with the law firm of Atwater & Cruikshank, of which he was a member, and has taken the office of Treasurer of the Empire City Subway Company, with offices at 18 Courtlandt Street, New York City.

'00.—Julian V. Bourne died in Prescott, Arizona, Tuesday, August 14th.

'00 —John W. Edgerton, Quiz Tutor and Secretary of the Law School Faculty, has been appointed Instructor in the Study of Cases for the Academic year 1906-7.

'00.—A son was born to Mr. and Mrs. Herbert David Palmer, of Cleveland, Ohio, on October 19th. He has been named David Flinn Palmer.

'01 —Charles L. Burnham, lately of the firm of Van Wyck, Mygatt and Burnham, has opened an office for the general practice of law, in the Mutual Life Building, No. 26 Liberty Street, New York City.

'01.—Charles J. Fox, is in the office of the Director of Public Works of the City of New Haven.

'02.—Eliot Watrous, formerly with Watrous & Day, announces that he has opened an office for the general practice of law at Room 315, Exchange Building, 121 Church Street, New Haven, Conn.

'02.—Mr. and Mrs. Elizah R. Kennedy of Brooklyn, N. Y., announce the marriage of their daughter Susan Pratt Kennedy to Frank W. Tully. They will reside in Boston, Mass.

'03.—George H. Bartholomew, is with the firm of Cravath, Henderson and De Gersdorff, No. 52 William Street, New York City.

'03.—Charles D. Lockwood has resigned as deputy assistant to District Attorney Jerome of New York City, and was recently elected Judge of Probate for Stamford, Conn.

'04.—John Paul Baldwin's present address is 2512 Windsor Avenue, Kansas City, Mo.

'04.—James H. Jefferies has recently been appointed by the United States Circuit Court for the Eastern District of Kentucky, to superintend the surveying of 86,000 acres of undeveloped mountain lands lying in the counties of Harlan and Bell, Kentucky, the title to which is in litigation. It will take two years or more to complete the work. The partnership heretofore existing between D. B. Logan and Mr. Jefferies, under the firm name of Logan & Jefferies, has been dissolved.

'05.—Frank E. Bollman is with the firm of Bollman & Bollman, at 82 Church Street, New Haven, Conn.

'06.—Lawrence A. Howard, formerly with Sperry & McLean, has opened an office for the general practice of law, in room 68 of the First National Bank Building, No. 50 State Street, Hartford, Conn.

'06.—John M. Cates has been head coach of the Annapolis Football eleven the present season. He is to enter business in Indiana January 1st next.

'06.—Seth W. Baldwin is with the firm of Watrous & Day, at 121 Church Street, New Haven.

## REVIEWS.

*Lincoln the Lawyer.* By Frederick Trevor Hill, Member of the New York Bar. The Century Company, New York, 1906. Cloth, pages 332.

There is no more interesting figure in American history than Abraham Lincoln. Yet it is a singular fact that in the vast number of works concerning him but little attention has been given to his professional career. This neglect has seemed to produce a general impression that his practice at the bar was of a small and desultory nature and that at the time of his nomination for the presidency he was an obscure country lawyer only known by reason of his speeches in the famous debate with Senator Douglas. Recent investigations, however, have shown the error of this general impression. The conclusion is reached that the legal training of the statesman qualified him for his great task when he was called to the presidency, that "without such training he could not have accomplished his stupendous results," and that it is possible he would never have been called to that high station if it had not been for the position he had attained as a lawyer on the Illinois circuit.

Frederick Trevor Hill has not only rendered a distinct public service in presenting this book on "*Lincoln the Lawyer*," but he has provided for the profession a most entertaining legal recreation. It is primarily an attempt to show Lincoln's true position at the bar and the influence which his choice of a vocation had upon his subsequent career. A careful investigation and research of the records of the Illinois courts from 1836 until 1860 and personal contact with the few living contemporaries of Lincoln have especially qualified the authors to speak with authority.

Lincoln's early education had been sorely neglected. His opportunities for legal study were very limited, but after his admission to the bar his associations were such as to prove most valuable to him in legal training. A first partnership with Major John T. Stuart, who was engrossed in politics threw upon his shoulders the responsibility of a fair sized practice from the very beginning. Later his association with Judge Stephen T. Logan placed him under the tutorage of one of the greatest of the Illinois lawyers in whose office in later years were developed no less than four United States senators and three governors of states.

During his association with Judge Logan, Lincoln acquired a reputation which was more than local for being a safe counsellor and an able advocate. Though it is true that many of the litigations in which he was engaged were of no great monetary importance, yet many of these small cases involved most difficult questions and were in effect test cases which settled the law for

the new state. Continuing to rise in public estimation, upon his return from Congress in 1849 he became one of the leaders of the bar of the circuit among such men as Stephen A. Douglas, Gen. John M. Palmer and his former partner, Stephen T. Logan. Without doubt he was the best all-around jury lawyer of his day in Illinois. As a cross-examiner he has seldom been equaled. During his career he argued one hundred and seventy-two cases before the Supreme Court of Illinois, the highest Appellate Court of the state, showing a record rarely if ever equaled in his day.

One of the strongest confirmations of Lincoln's ability as a lawyer is the confidence which was reposed in him by his fellow competitors and by the judges before whom he practiced. Many of his most important cases were those in which he was engaged by other lawyers who had had an opportunity to know him in previous contests. His reputation for clear thinking and for honest statement of law and fact gave him what is known as the "ear of the court." And this was especially so in the course of his dealings with Judge David Davis of the Eighth Illinois Circuit, later Associate Justice of the Supreme Court of the United States. "It was Judge Davis and a handful of men who had learned to know and appreciate Lincoln as a lawyer—a small group of his fellow practitioners on the Eighth Circuit: Davis, the judge; Sweet, the advocate; and Logan, the leader of the bar, but especially Davis—who forced Lincoln upon the Chicago Convention in 1860, and thus gave him to the nation."

In presenting this material most entertainingly the author has not lost sight of the fact that in his extensive practice Lincoln lived up to the highest ideals of his profession. Throughout the book especial emphasis is given to this—his fairness to his opponents, his refusal to resort to questionable tricks or practices and his efforts to conciliate rather than to stir up litigation—making for the young lawyer a most valuable text book upon the ethics of the practice of the law.

The work is an important contribution to the literature upon this subject concerning Lincoln, bringing out as it does information concerning a phase of the great President's life which has hitherto been but briefly touched upon. It will be a source of satisfaction to the members of the bar to have it known that it was Lincoln's legal training which preeminently fitted him for his public work and that as a lawyer he is entitled to rank with the greatest the country has produced. G. S. V. S.

*Law of Contract.* By Sir William R. Anson, Bart., D.C.L., 2nd American copyright edition from 11th English edition, by Ernest W. Huffcut, pp. lii, 462. Oxford University Press.

For the introduction of the student to the study of the law of contract there is no better book published than the work of Sir William R. Anson. It is unsurpassed for a systematic arrangement of topics, for a clear and brief statement of principles, and for a lucid explanation of those principles. The work contains as

much of historical detail as can be read by a beginner with much profit, without at the same time containing such a "mass of statement and illustration" as might tend to "oppress and dishearten the student." The unusual success of the author in attaining his object is evidenced by the wide popularity of the numerous editions of his work, and by the extent to which other writers have used his outline and his text.

In section 32 and again in section 50 it is stated that an offer under seal cannot be revoked even though it has not been communicated to the offeree. This appears to the reviewer to be incorrect. In the first place, it is difficult to see why an offer under seal cannot be withdrawn, even after communication, in case the offer contains no express or implied promise that it shall remain open for a period of time. Surely a seal has an effect only upon a *promise*, dispensing with the necessity of a consideration for a *promise*. There seems to be no ground for a distinction between offers under seal and offers not under seal; such a distinction should be made in the case of promises alone. All mere offers are revocable before acceptance. But secondly, even though the offer contains a promissory expression or implication that the offer is to remain open for a period of time, it should be held to be revocable before it has been communicated. Such a promissory expression is a mere *pollicitation* before it has been assented to by the offeree, and is not a promise at all. See Anson, sections 6 and 23. It is the assent and not the seal that turns a *pollicitation* into a promise. Further, can there be such a thing as an uncommunicated offer? The existence of an offeree and communication to him would seem to be presupposed by the term "offer" itself. See Anson, section 29. If so, it ought to be held that the creator of the thing may stop half way in the creating process, and by drawing back his words before they have been given the breath of life by communication, prevent them from ever becoming an offer at all. The case of *Xenos v. Wickham* and other similar cases can probably be explained so as not to be in conflict with the foregoing. The author admits that his rule is "anomalous" and "irreconcilable with the modern analysis of contract," and the American editor advises that the text be taken with great caution in the United States.

The editor cites American cases in numbers amply sufficient for the student's purpose, and in his notes gives due consideration to the variations from the English doctrines as they exist in our many American jurisdictions. He has also made satisfactory additions to the text itself in places where the condition of American law is such as to demand it; as for example in the case of contracts for the benefit of third persons and in the case of discharge of contract by substantial performance. Altogether this edition is to be highly recommended to American students.

A. L. C.

*The Law of Innkeepers and Hotels, Theatres, Sleeping Cars.* By Joseph Henry Beale, Jr., Bussey Professor of Law in Harvard University. Wm. J. Nagel, Boston, Mass. Pages 621, Buckram.

Professor Beale's latest work is written in the same clear and concise manner which characterizes his former works on public service companies and taxation of such corporations. The result is an up-to-date exposition of the law on the various subjects with every opportunity offered for ready reference. This is shown by the division of the book into 32 chapters with 452 sections which, with a lengthy alphabetical index and copious chapter headings makes it convenient to turn to any desired phase of the subject with the least possible amount of searching. About one-half of the book is given to the main subject of Innkeepers. The opening chapter gives a short history of English inns and medieval conditions of travel and traces the development of the law to the present day, showing the necessity for the rather onerous duties and liabilities of this class of public servants. That there is even now a considerable difference between the English and American views of their responsibilities is clearly indicated by the extracts taken from the decisions in both countries. On the various points of conflict no attempt is made to strike a middle ground, but the differences are stated as such leaving it to the individual reader to draw his own conclusions. This is to be commended, as it avoids the confusion which so often arises in such cases. Short chapters are devoted to the status of keepers of boarding houses, lodging houses, restaurants and bath houses, and also to the proprietors of theatres. The chapter on sleeping cars makes very interesting reading. While the law on the other subjects may be said to be fairly well settled, the law of sleeping cars, anomalous as it is, is still being developed. As the author states, "a sleeping car company is neither an innkeeper nor a common carrier," but still owes many of the duties of both to the public. For this reason the subject has been carefully taken up and, as far as possible, its exact status defined. In an appendix of 227 pages the most important American statutes relating to inns and other houses of public entertainment have been collected and arranged in order of states, from Alabama to Wisconsin, followed by those of the district of Columbia and Federal laws. The citation of decisions includes those contained in the American Digest and English Annual for 1905, and Canadian and other Colonial Digests for 1904.

The reading of the book is made pleasant by the absence of mistakes in proof-reading and the use of bold clear type.

F. P. M.

*The Declaration of Independence.—Its History.* John H. Hazelton. Dodd, Mead & Co., New York, 1906. Cloth. Pages 613.

John W. Hazelton has rendered a true service to the student of the early history of the American state in presenting the work entitled "The Declaration of Independence—Its History." Before the appearance of this volume it has been necessary for the

careful student of this portion of our history to search many volumes to glean the facts concerning this document. There are several books on the subject which have been written by thoroughly competent men, but in all of them the truth is obscured more or less by the personal views of the authors, which, though undoubtedly based on the original sources of information, have not the true ring about them. In this work John H. Hazelton has presented the original sources and has made only whatever comment is necessary to enable the reader to appreciate their true significance. This feature of the work stamps it as authentic and reliable rather than as second hand and of doubtful reliability. The author quotes very freely from whatever letters, documents and other contemporaneous writings that exist and which throw any light on the facts. The work abounds in cuts of these writings which alone are of great interest.

The account begins with the First Continental Congress held in Philadelphia on the 5th of September, 1774. It was then that the people of the Colonies recognized for the first time that "the cause of Boston was a common cause," and adopted the non-importation acts to bring the mother country to terms by cutting off her trade with the Colonies which was considered as of vital importance. This was the first step towards uniting the Colonies. Yet in this congress no action towards declaring independence was suggested.

Subsequent chapters deal with the events of the years 1775 and 1776, the initial step which, the author states, was taken on Friday June 7th, 1776, drafting the Declaration, the signing, the effect of the Declaration and what was thought of it, etc. The ground is thoroughly and systematically covered.

Much valuable material is to be found in the appendix. The notes of Jefferson and various letters, which throw much light on the points involved are given. The author has adopted a very helpful method of presenting the seven authentic drafts of the Declaration, the Declaration on parchment, now in the Department of State; the Declaration as written out in the *corrected* Journal; the Declaration as printed by Dunlap under the order of Congress, a copy of which is wafered into the *rough* Journal; the draft of the Declaration in the handwriting of Jefferson, now in the American Philosophical Society in Philadelphia; the draft of the Declaration in the handwriting of Jefferson, now in the Lenox Public Library, New York; the draft of the Declaration in the handwriting of Jefferson, now in the Massachusetts Historical Society, Boston; and the copy in the handwriting of John Adams of the "*Rough draught*" of the Declaration, now at the Massachusetts Historical Society. The lines of the six drafts are placed under the lines of the first draft above mentioned so that the differences are brought out in a most striking manner. This arrangement has been very cleverly carried out and is one of the many instances in which the author has shown his skill. Following these drafts are accounts of their histories and explana-

tory notes. There are also copious notes to the text and to the index, further amplifying the story of the famous document.

Taken as a whole the work is complete and accurately presents the fact uncolored by personal bias and opinions. It is safe to say that hereafter students will depend on this work for an authentic account of the history of the Declaration of Independence.  
C. H. H.

*American Bankruptcy Reports—Digest of the Bankruptcy Decisions under the National Bankruptcy Act of 1898.* By Melvin T. Bender and Harold J. Hinman of the Albany, New York, Bar. 1906. Pages, XIII, 560. Buckram.

With the increasing importance of the subject of Bankruptcy the members of the bar have for some time felt the need for a reliable and comprehensive digest of the American Bankruptcy Decisions. The busy lawyer of today finds it a difficult and laborious task to examine minutely each volume of a long series of reports. Therefore the Digest under discussion will undoubtedly receive a hearty welcome from all members of the profession who are at all interested in the subject of Bankruptcy.

This volume includes within a compass of 560 pages, a clear, concise and complete digest of all the decisions under the Bankruptcy Act of 1898, reported in the American Bankruptcy Reports, volume 1-14 inclusive (1898-1906) and of the notes contained in each volume. The first XIII pages are taken up with a table of the sections of the Act of 1898 construed, considered or affected by the reported decisions. The general arrangement of topics and the system of subheads and cross-references closely resembles that employed in the Century and other standard digests. The arrangement of the work as a whole is excellent and it will undoubtedly prove it self an invaluable assistance in ascertaining the law on the various phases of the subject of Bankruptcy.  
J. M. F.



## ACKNOWLEDGMENTS.

THE FIRST YEAR OF ROMAN LAW. By Fernand Bernard. Translated by Charles O. Sherman, D.C.L., Oxford University Press. American Branch, 91 and 93 Fifth avenue, New York. *Review will follow.*

PROBATE REPORTS ANNOTATED, with notes and references. By William Lawrence Clark—Clark on Contracts, etc., Volume X. Baker, Voorhis & Company, New York. Sheep. Pages 709.

THE FOUNDATIONS OF LEGAL LIABILITY. By Thomas Atkins Street, A.M., LL.B. Edward Thompson Company, Northport, Long Island, N. Y. Sheep, 3 volumes. Pages 1-500; 1-559; 1-572. *Review will follow.*

PROCEEDINGS OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION HELD AT CHICAGO, DECEMBER 28-30, 1904. Mekeisham Press, Lancaster, Pa., 1905. Volume I. Cloth. Pages 249.

FOIBLES OF THE BENCH. By Henry S. Wilcox of the Chicago Bar. Published by Legal Literature Company, Chicago, Ill. Cloth. Pages 144.

A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS. By Howard S. Abbott of the Minneapolis Bar. Three volumes. Keefe-Davidson Co., St. Paul. Sheep. Pages 3045. *Review will follow.*

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## CAPITAL AND CAPITAL STOCK.

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There are certainly few legal expressions more familiar than "capital," "stock" and "capital stock." And yet when one examines the statutes and decisions in which they are employed, he finds the most extraordinary confusion and vagueness of thought. Possibly it would be more fair to the courts to say that legislatures have been at sea in the use of the terms, and judges, in endeavoring to clarify the situation, have only increased the tangle. It certainly ought not to be unprofitable, therefore, to inquire whether these several misconceptions may not be described with precision and future disorder lessened.

Both "stock" and "capital" seem to have been originally economic rather than legal in their significance. As adopted by Adam Smith and Malthus, the definition of the former was accumulated values from past labor, while the latter was the portion of such values employed in the production of more wealth.<sup>1</sup>

With the development of corporations both of these words, while retaining the economic, acquired gradually distinct and technical meanings. Stock thus came to mean the undivided interest which a shareholder had in the net assets of a company, while capital became the permanent funds with which the business of the corporation was conducted and which in general arose from the original sales of its "stock."<sup>2</sup>

The further division of "stock" corporations, however, into "monied" and "business," that is, banking and mercantile, produced a still narrower specialization of the word "capital." It is evident

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1. Lalor's Cycl. Pol. Science, Article "Capital."

2. See Bouvier Law Dictionary, Rawle's Revision, Article "Stock."

that whatever funds were originally subscribed might be greatly augmented in value by judicious management and investment, or reduced to the vanishing point by misfortune or bad judgment. But by reason of the peculiar functions of banks, subscribers to the "stock" were obliged to pay the corporations the nominal amount of such subscriptions in cash. The aggregate fund thus received became a fixed, permanent "entity" to be invested apart from other resources, not increasing in its nominal value and not permitted to fall below without imposing an obligation upon the stockholders to make such deficiency good.<sup>3</sup>

This is the present "capital" in the technical sense of the word. Now, mercantile corporations, we believe, have never been obliged to maintain a rigid and carefully guarded fund. At one time they were obliged to commence business with the amount specified in their certificates of incorporation subscribed in cash. But this rule has been relaxed, and stock may now be issued originally for property or labor as well as cash, and in the absence of fraud no question as to the value of the *quid pro quo* may be raised.<sup>4</sup> Nor from that time to the dissolution of the corporation is there any fixed amount to be preserved in cash or in property instantly convertible into cash. In brief, business corporations are supposed to have "capital" but are not obliged to maintain "a capital." It is the failure to observe this simple distinction that seems to be one of the principal grounds of confusion, and when the words were blended in the phrase "capital stock" without any precise explanation of what was intended thereby, the perplexity was very largely increased.

In the National Bank Acts, "capital stock" appears to be employed in two distinct senses without any suggestion in the text that this is so. Thus in section 5140 of the Revised Statutes, which begins "At least fifty per centum of the capital stock of every association shall be paid in before it shall be authorized to commence business" it is clearly used as identical with "capital." Section 5143 begins: "Any association formed under this title may, by the vote of the shareholders owning two-thirds of the capital stock, reduce its capital to any sum," etc., where the phrase refers to the shares owned by the stockholders.<sup>5</sup> While in order to be strictly impartial, in section 5205 it is used in both senses within a few lines. Thus: "Every association . . . whose capital stock shall have

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3. U. S. Revised Statutes, sections 5140 and 5205.

4. Cook on Corporations, fifth edition, section 18.

5. See Federal Statutes Annotated (1905), Volume V, page 101.

6. See Federal Statutes Annotated (1905), Volume V, page 103.

become impaired by losses or otherwise shall . . . pay the deficiency . . . by assessment upon the shareholders *pro rata* for the amount of capital stock held by each.”<sup>7</sup>

The United States Supreme Court in the Delaware R. R. Tax case,<sup>8</sup> attempted to explain matters. In this case the State of Delaware had passed an act taxing railroad and canal companies “one-fourth of one per cent upon the actual cash value of every share of its capital stock” and in the course of an opinion upholding the tax Justice Field observed: “The share of a stockholder is, in one aspect, something different from the capital stock of the company; the latter only is the property of the corporation; the former is the individual interest of the stockholder.” The learned justice thus suggested that “capital stock” is a fund of the corporation in order to pave the way for a declaration that the burden was imposed upon the corporation and not upon the stockholders. It seems, however, that this was quite unnecessary as the law distinctly stated the tax to be upon the “cash value” of the shares and not upon the “capital stock.” In other words, the eminently just figure of the amount that would have been distributable upon the stock if the corporation had then gone into liquidation, was made the measure of the assessment, but the obligation was imposed upon the company itself. The decision was doubtless correct but this remark appears to have been erroneous. However, in another case reported in the same volume,<sup>9</sup> Justice Field went still further and interpreted a statute of Missouri which read: “The stock of said company shall be exempt from all state and county taxes” as follows: “Some attempt was made from the use of the term *stock* . . . to establish the position that the exemption extended only to the separate shares of the individual stockholders. But . . . the terms “stock of the company” imported the capital stock of such company, the subscribed fund which the company held, as distinguished from the separate interests of the individual stockholders.” Here the learned justice took the liberty of interpreting “stock” of a railway company as denoting the same as “capital stock” in his opinion in the Delaware R. R. Tax case. If, however, words mean anything, it would seem that a stockholder is one who holds stock and that consequently “stock” is what is possessed by the shareholders. It may be that the intention of the legislature was correctly interpreted but it certainly would have been more accurate if Justice Field had said plainly that

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7. See Federal Statutes Annotated (1905), Volume V, page 143.

8. 18 Wall. 206.

9. *Trask v. McGuire*, 18 Wall. 402.

they had employed in the statute a word they did not mean, instead of stretching "stock" in so merciless a fashion.

It will be observed that in neither of these cases did the court suggest that they were deciding that the same words might be employed to mean totally different things at different times. But in a later Federal case<sup>10</sup> this explanation was given: "The *capital stock*<sup>11</sup> of a corporation in its merely nominal sense, is the sum specified or authorized in its charter and thereby usually divided into aliquot . . . shares. . . . In its substantial sense, [it] is the fund of money or other property actually or potentially in its possession, derived or to be derived by it from a sale of its shares. This fund includes not only money or other property received by the corporation for shares of stock, but all balances of purchase money or installments due the corporation for shares sold by it, and all unpaid subscriptions for shares. The fund may through accident, shrinkage in values, or business misfortune be impaired; but subject to such contingencies, it is intended to and should be equal to the par value of the nominal *capital stock*<sup>12</sup> which it represents."

Here the court admitted that there are at least a substantial and a nominal meaning to "capital stock" which have nothing in common. He succeeded, however, in employing it in three senses: (a) the capitalization named in the charter, (b) proceeds of sale of stock, and (c) (at the end of the quotation) the stock in the hands of shareholders.

In a New York case<sup>13</sup> where a monied corporation taxed upon the "actual value of its capital stock" resisted an assessment based upon the market value of the shares, asserting that by the phrase was meant its capital, which was invested in United States bonds and so not taxable,<sup>14</sup> the court announced unequivocally that there are two entirely different meanings to "capital stock" and that they have nothing whatever to do with one another. No rule was suggested by which one might know which meaning was intended in any particular case, Judge Finch saying merely: "That of the company is simply its capital, existing in money or property, or both; while that of the shareholders is representative not merely of that existing and tangible capital, but also of surplus, of dividend earning power, of franchise and the good will of an established and prosper-

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10. *Hamor v. Taylor Rice Engineering Co.*, 84 Fed. Rep. 392.

11. Italics the writer's.

12. Italics the writer's.

13. *People ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 433.

14. *Bank Tax Case*, 2 Wall. 208.

ous business. . . . There are reasons in abundance for the conclusion that by the phrase "capital stock" the statute means not the share stock, but the capital owned by the corporation; the fund required to be paid in and kept intact as the basis of the business enterprise and the chief factor in its safety. One ample reason is derived from the fact that the tax is assessed against the corporation and upon its property and not upon the shareholders and so upon their property."

The court apparently intended (as we said) that there are these two well defined and generally accepted meanings. But nothing could be clearer to one reading statutes or opinions than that scarcely any of the users were aware that they were employing an equivocation like, for example, the word "present" (meaning "now" or "gift") for there is not the slightest attempt to indicate which of the two is intended.

Bouvier<sup>15</sup> in his definition of "capital stock" welds the two conceptions together and produces the extraordinary description that it is the sum divided into shares which is raised by mutual subscription. But the money in the hands of the corporation is not divided into "shares" nor are the shares of stock in the hands of the stockholders "sums of money."

It would be a very simple matter to prevent this uncertainty. As a matter of fact "stock" and "capital stock" are now synonymous, referring exclusively to the shares held by the stockholders, the only possible distinction being that the former is usually used distributively (as "the stock owned by Jones") and the latter collectively to represent the sum total of shares outstanding. The shifting of the conception from asset to liability is illustrated by an interesting change in the phraseology of stock certificates. In a Massachusetts case of fifty years ago<sup>16</sup> a certificate in dispute read as representing so many "shares *in* the capital stock," whereas to-day the well-nigh universal rule is to have the wording "so many shares *of* the capital stock."<sup>17</sup> Moreover, if, as the Supreme Court and state courts maintain, the phrase denotes the possessions of the corporation, why should it not be used as a description in corporate mortgages? Yet who can doubt that if a company undertook to

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15. Law Dictionary, Rawle's Revision.

16. *Fisher v. Essex Bank*, 71 Mass. at page 374.

17. See for example Forms in White on Corporations, fifth edition, pages 929, and 932. *Contra*, page 930. Also Dill on General Corporation Act of New Jersey. In *Hall & Farley Trustees v. Henderson* (126 Ala. page 481), "capital stock" is employed correctly as meaning the stock in the hands of the shareholders.

mortgage "capital stock" everyone would suppose that the "treasury stock" was intended, that is, the share stock not yet marketed? And if a company is taxed "upon the actual value of its capital stock" is it not perfectly evident as was said above, that the tax is one upon the *company*, establishing very justly its taxable wealth as equal to the value of its net assets or, in other words, the amount that would be distributable among the stockholders in case the corporation were liquidated at that time?

"Capital" should be confined strictly to the permanent fund of a monied corporation. As was noted above, business corporations have not "a capital" that they are obliged to maintain. Nothing, unfortunately, is more common than the existence of a company without cash or a dollar's worth of property of any kind and no possibility of calling upon the stockholders for assessments. They have "capitalization" (that is, the nominal or par value of the stock) "property" and "assets" and every reference to their possessions means one of these things. It is unnecessary and confusing to employ "capital" in connection with them.<sup>18</sup> The idea that it may mean such property as is necessary for the conduct of their business is in actual experience so vague as to be quite worthless. If legislatures wish to tax whatever property they possess, why not say so, instead of describing it as "capital" or "capital stock?"<sup>19</sup> And if, nevertheless, they employ these terms inaccurately, while their intention appears from the context, why should not the courts simply declare the fact and say frankly that the wrong words were used, instead of stretching them to cover various unrelated conceptions and so perpetuate an extraordinary confusion?

*Frederick Dwight,  
of the New York Bar.*

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18. Unless, possibly, in the untechnical, but convenient phrase "working capital." In *Bent v. Hart* (10 Mo. Appeals 143), the court declared "capital stock" and "working capital" to be the same.

19. In *Pacific Hotel Co. v. Lieb* (83 Ill. 602), the court held that "capital stock" as employed in a tax law meant "all that belongs to the corporation as its property, whether tangible or intangible, and of whatever nature or kind" (page 610). So also *Reid v. Eatonton Mfg. Co.* (40 Ga. 98), at page 104, seemed to use it as "assets."

## TITLES TO COAL LAND IN PENN. AND INCIDENTAL MONOPOLIES CONNECTED THEREWITH.

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An interesting chapter in the study of the law and one which is possible to become more interesting, as a commercial factor in the United States, arises out of the ownership of coal, and titles relating to coal lands, and the alleged injurious monopoly created thereby in railroad corporations.

The ease in acquiring title to coal severed from the surface, in the form of leases, so-called, construed by the courts to be titles in fee, with no payment of money except by the ton as the coal was mined, or delivered in cars at the mouth of the tunnel or shaft, made investment in such property attractive both for corporations and individuals. It required no increase of capital on that account, and no payment of money until it was received. The increase of capital was in the preparation of the coal and delivery in the cars. In early times it resulted in a monopoly by the railroad interest and large individual operators by which, through judicious and strategic purchases of land, large bodies of land were controlled without purchase until the market or the will of the operator demanded.

In its early history the question of title was before the courts of Pennsylvania and received the careful consideration and judgment which all subsequent developments have justified. In all states of the Union where the common law and the laws of England regulated titles of land, prior to the Revolution, conveyancing had been reduced to an almost exact science in England. The formal deed with its artistically constructed parts controlled the construction thereof. But in the colonies and subsequent states the free spirit of America, with its popular ideas of government, communicated itself considerably to business transactions and other departments of society, and they were restive under forms of any kind, and wrote their contracts between themselves, with a freedom of will as well as a free hand. This may have arisen partly from the natural result of the condition of the colonists, living far from the shadow of a landed aristocracy which sought through law and forms, the perpetuation of wealth and real estate in the family with the right of primogeniture. The colonists came here, with few exceptions, more or less impoverished, valuing freedom of thought



and action above a bound conscience, and preferring a large family to a perpetual name secured by the injustice of the old-time heredity.

When it came to the matter of transfers of the interest in coal underlying the surface, which afforded a compensation, with the title to the farm untouched, the inartistic "agreement," or "lease," or "right to mine" or license, as it might have been thought of, arose with its doubtful significance and not infrequently hybrid character. The written instrument would call the consideration actually paid, "rent;" sometimes "royalty" or "price per ton." It would contain clauses of distraint, forfeitures for non-payment of rent, with right of entry and dispossession. The document grew in size, in an attempt to meet every future emergency, until it became a formidable instrument of many pages.

At an early day the attention of the courts was called to unravel the dubious character of the so-called leases for coal in the ground and separate from the surface and sub-soil, which remained in the grantor. The first case of importance came before the Supreme Court of Pennsylvania, and, fraught with difficulties, was so decided as to place forever a clear and distinct method of construction, and in its far-reaching results put the rights of coal land separated from the surface, on a permanent basis of value and title, with as full protection to the grantee as if he had a fee simple title in technical form. The case referred to is *Caldwell v. Fulton*, 31 Penna. State Reports 475, decided first in 1855. The questions came before the court and were reargued twice. Justice Woodward, who decided the first case, came from the coal regions. He was of a family famous in the law and on the bench, for sound learning, clear thought and wise forecast. The facts of that case are the following:

The action itself was trespass and it involved the title to the coal, the taking of which constituted the trespass. Caldwell, the ancestor of the plaintiff, was the owner of the *locus in quo*. In 1831 Caldwell conveyed to one Greer, sixteen acres, a tract lying on the Youghiogeny river; and "also, the full right, title and privilege of digging and taking away stone coal, to any extent the said Greer may think proper to do, or cause to be done, under any of the land now owned and occupied by the said Caldwell; provided, nevertheless, the entrance thereto, and the discharge therefrom be on the foregoing described premises" (the sixteen acres). The deed acknowledged a consideration of one thousand eight hundred dollars, describing by metes and bounds two tracts (the sixteen acres),

and then grants the coal in the terms above quoted. The habendum called the property conveyed "two lots or parcels of land" and the "aforesaid right to the stone coal," and is repeated in the covenant of warranty. Greer and wife subsequently conveyed an undivided half of the premises to one Case; Case to Bell; Greer also conveyed the other undivided half to McCune. Bell and McCune made partition according to agreed lines of the sixteen acres and the coal. McCune leased to Fulton in 1852, and it was the entry upon the coal under this lease for which suit was brought.

The court below was at a loss whether to denominate the grant of coal in Caldwell's deed to Greer, a common in gross, or appurtenant, or a license, but was clear that it was not an absolute grant of all the coal under plaintiff's land. The question also arose in the court above whether it was a corporeal or incorporeal hereditament. For, if it was incorporeal a division of it by the deed of Greer was not possible and extinguished the title in Greer, and his grantee. The court met all these questions, reviewing the English cases, and decided that it was a corporeal hereditament, and reversed the court below and construed the grant to be a fee simple.

On the second argument of the case in 1858, which was designed to review the case of 1855, Strong, Justice, enters again into the full discussion of the principles involved, and under the emphatic statement that "Coal and minerals in place are land" and therefore a corporeal hereditament, holds that the coal may be conveyed as such, and the title to the coal may be in one person, and to the surface in another, and each hold a fee simple. In England, owing to the doctrine or livery of seisin and the impossibility of making livery of coal below the surface, a difficulty arose in the minds of the judges, but in this country it was solved because the recording of the deed takes the place of livery.

A few quotations from the early discussion will make the trend of the American discussion clear. In the case cited under the agreement, Woodward, Judge, says: "A license it cannot be. The form of the conveyance excludes that. Because a mere license to enjoy a privilege in land is not an estate therein; it may be granted without deed, and even without writing, notwithstanding the statute of frauds. But here an estate or interest was evidently intended to be conveyed and it must have been either a corporeal or incorporeal hereditament. If incorporeal I agree it was not divisible. . . . An exclusive right to all the coal to be taken, without limitation except as to the point of ingress and egress, is a sale of the coal itself; and there is nothing incorporeal about coal. It is included in the defini-

tion of land." In the same decision of 1858, same case, Strong, J. (Yale 1828), says: "Coal and minerals in place are land. Nothing is more common in Pennsylvania than that the surface right should be in one man and the mineral right in another. . . . Both holders of a corporeal hereditament." Through a long line of decisions down to as late as *Sanderson v. Railroad Co.*, 109 Pa. St. 589, when the attempt was made by two arguments to shake the uniformity of the rule, the same rule of construction has been maintained in the following words: "When the parties omit to name a term, do not create a lease at will, nor a lease for life, though much of their contract is expressed in words familiar to a lease, the whole instrument must be taken into view to ascertain the intent."

Notwithstanding the clear reasoning and emphatic conclusiveness found in the case of *Caldwell v. Fulton*, the zeal of counsel for their clients in repeated instances endeavored to shake the minds of the judiciary from time to time by presenting nice distinctions. The only result was that, with the rule that the intention of the parties was always to govern in determining the *quantum* of estate, the court laid down the principle as a controlling guide to construction, that where the instrument of writing was a sale of *all* the coal, exclusive in the vendee, it became a severance of the coal from the surface, and vested an absolute title in the vendee. And these two facts were to be gathered from the whole instrument. All natural deductions follow this kind of title. Vendee is liable for taxes on the coal; he may control the space left for gangways to transport coal through it from other lands, at least until the time of exhaustion of his own lands; and all logical deductions characteristic of a fee simple title.

During the Civil War when the income tax was laid, the decision of the Commissioner of Internal Revenue, who was a lawyer and understood the Pennsylvania law as to coal, gave instructions that under such conveyances the royalty received was consideration money for the sale of land, and was not to be considered as income or rent, although called rent in the lease and payable by the ton mined.

Out of the development of the coal interest there naturally grew the interest which the railroads have taken in securing for themselves a permanent and continuous business for their roads, at an early time when freight was scarce, and railroad investments not attractive, and earnings were low. A little history is pertinent here.

In 1814 the Legislature of Pennsylvania granted a charter to the Lehigh Coal & Navigation Company to create a Slack Water Navi-

gation of the Lehigh river. This developed by legislation into a coal carrying company, ownership of coal lands and mining of coal and selling in the markets of the country. In 1824 a charter was granted to Maurice Wurts to improve the navigation of the Lackawaxen river, which subsequently emerged into the Delaware & Hudson Canal Company, a corporation of the state of New York, recognized by the state of Pennsylvania, authorized to hold coal lands, mine, sell and carry coal to market. This company connected the coal fields of the Northern Anthracite region with the Hudson river and New York city. This is an interesting fact, if any attempt is made to curb vested rights of public carrying companies and exclude them from transporting their own products to the markets of the several states of the Union. These were the beginnings of the railroad and other corporate interests in the Anthracite coal fields. It soon developed into a popular and legislative idea and expression that the interest of Pennsylvania was to encourage the development of the coal fields, both Anthracite and Bituminous, by granting charters to railroad and other public corporations, with the right to mine and sell coal in the markets. The railroads also found that the steady furnishing of an article becoming more and more a necessity for home comfort, and varied business and manufacturing interests, gave stability and strength to the freight traffic. In fact, some of the railroads were expressly built for this kind of freight, and between the desires of the people to promote industries on the line, and the inviting prospect presented to the railroads, some of them were lifted out of bankruptcy, and prosperity was widespread. The railroads in course of time controlled the traffic more or less, and a kind of monopoly was created, not so much against the purchasers and consumers of coal, as against the individual owners of coal land desirous of a market which they could not reach, and for which the railroads stood in their way. As a result of this state of affairs, when the Constitutional Convention of 1873 was called, one of the things sought was to break this monopoly. It was found by this Convention that this could not legally be done. The grants in the railroad charters had become vested rights of contract. In this dilemma a committee of the Convention called on officers of the railroad companies to ascertain if some plan could not be devised to secure the consent of the railroads to a modification of this vested right. Of course this could not be done. During one of the consultations the writer was present. It was suggested that the only method of breaking a vested monopoly was to make it general and open the same privileges to the general public.

Another evil to be remedied by the Convention was the great mass of special charters, which had been granted by and were sought at each session of the legislature. This was met by providing by general laws, for all classes of corporations, mining and railroads included. An examination of the Constitution of 1873 of Pennsylvania shows that while it provided that "no" (future) "incorporated company doing the business of a common carrier shall engage in mining or manufacturing articles for transportation over its works," nevertheless it did provide that "any mining or manufacturing company may carry the products of its mines or manufactories on its railroad or canal, not exceeding fifty miles in length." These provisions, as subsequent events show, relieved the owners of lands to a great extent, if not entirely from the monopoly which existed against them.

It is interesting to study the result of this legislation in the growth and prosperity of the state. It is not presumed that it is all due to the breaking of this one kind of monopoly, and it is only suggested as a possible clue to the breaking of other monopolies entrenched under vested rights so as to rob them of much, if not all their evils. In the year 1870 (census) the amount of

Bituminous coal marketed in Pennsylvania was.....	7,798,517 tons
Anthracite coal marketed was.....	15,650,275 tons
1905 the Bituminous coal marketed was.....	119,361,514 tons
1905 Anthracite coal marketed was.....	78,647,020 tons

In each decade since 1870 the population of Pennsylvania has increased about one million. It is not claimed that these statistics are anything more than to illustrate a factor which largely relieved in its outcome the monopoly complained of in 1870. As early as 1839 Jessup, P. J. (Yale 1815) decided that the lateral railroad act of 1832 which authorized the building of a railroad with right of eminent domain, using private property for a private use, in order to connect individual mines with public transportation companies, was constitutional. One of the grounds for this decision is "that the mining of coal was of public interest." The judgment of the lower court was affirmed by the Supreme Court in the following words of Gibson, C. J.: "Pennsylvania has an incalculable interest in her coal mines; nor will it be alleged that the incorporation of railroad companies for the development of her resources, in this or any other particular would not be a measure of public utility." For cases in other states approving of this decision see Am. Dec., Volume 36, page 144.

A new question is now arising and demanding public attention,

## TITLES TO COAL LAND IN PENNSYLVANIA 173

and in one of its aspects it is germane to the subject we have been treating, viz., the monopoly in the coal trade itself, in connection with another evil of discrimination in rates of freight. It is not presented as a clear-cut and single issue and is therefore not free from difficulties which otherwise would be more easy of solution. Unfortunately the prosperity of the country for many years, and the haste to be suddenly rich, have led not one class of corporations, but different classes, to enter upon a method of business unjustified even by a desire of increased and legitimate profits. It has created a frenzy almost as bad as "frenzied finance," and rests in the public mind with no clear apprehension as to the wise method to take to remedy it. The real thing to be reached is almost entirely monopolistic injustice in all kinds of corporate management. Rascality can always be legally reached in this country in the long run, and is as widely different from a monopoly which has become a "vested right," under the meaning of the Constitution of state and national laws, as a legal right is from an absolute wrong. The serious question proper for cautious consideration, difficult as it is, is that which is raised by the suggestion that no common carrier shall be allowed to carry as freight its own goods and products, and this to take the form of legislation by the national government, reaching to the past as well as the future. It is proposed to reach this through the power given to the United States to "regulate commerce," and deprive railroads of all vested rights to carry their own products, outside of the state of their incorporation. It is possible, unfortunately, that it may become a political question. It certainly is a legal one. It is not the purpose of this article to give a legal opinion in the matter. It may be asserted, however, that under the Dartmouth College case the result sought by retroaction cannot be reached without a legal struggle as famous as that case, with a possible unhinging of principles as sacred as they are useful, settled by that case. The question is not merely legal; it is to a certain extent social, and possibly revolutionary. Notwithstanding all that may be said of the evils which have existed in connection with corporate action in this respect, it has not been an unmixed evil. Principles of constitutional and fundamental law well considered, under which safety and prosperity have arisen, must appeal to the legal mind to offer a word of caution. The question also has another aspect than a legal one, viz., whether any success in destroying a vested right in public corporations to sell their product in any market does not introduce an evil. The owner of the coal now sells it, as sometimes the farmer, his product to the carrying company at his own door.

He is not obliged to seek his customer, nor his pay in Montreal or New Orleans. The purchaser in New Orleans is not obliged to seek Pennsylvania for his purchase. Also, does the Constitutional question to regulate commerce between the states mean to destroy it in any sense, as it has arisen through the century under legislative purpose to promote the welfare and mutual prosperity between the states. This subject is germane to the matter treated in the first part of this article, because it was through the settlement of the titles through judicial action on a distinct and permanent basis that the railroads under legislative sanction acquired any monopoly in that product. Their contracts are unique and beneficial to both parties. Whatever evils exist to-day in corporate action which has resulted in the "Trusts" and the stifling of competition, in rebates and reduction of price to favored customers, are not due to the fact that transportation companies own their transported product. Even if it were, it is competent, by the scientific methods of modern individual business to ascertain the facts and learn the exact normal market price of any product and its freight charge. Under the outcome of the Coal Commission what do we have,—brought about by the initiative of the executive? We have one man ascertaining to a cent the average market value of coal at tide-water and exactly regulating the price up or down to be paid as the wages of the miner. In this view there can be no question in regard to the government having the legal and practical power, under regulating commerce, to regulate freight rates, and prevent rebates under a false price for coal which is not the market price. This can be done outside of politics, and within the realm of commercial exactitude and under proper regulations of control through the department of commerce and labor. Why, under the power to regulate commerce, should the Constitution be strained to unbalance business methods which have grown up, bringing prosperity and convenience to the whole country and in a direction that violates the sanctity of contracts and unsettles business, when the same goal may be reached by a wiser course? The simple fact that some corporations have a right to carry their own product to market, which has become vested, is not the evil,—if it be an evil,—that society is aiming at. The evil to-day is graft, discrimination, rebates to hide discrimination. The investigation already made shows it did not hide discrimination, and the law can correct that, without violating or altering the Constitution under one of the most sacred principles, the inviolability of contracts by state or national legislation. A careful study at this day of the Dartmouth College case is worth the

effort. The sound principles there enunciated and their far-reaching influence on all the varied commercial and corporate interests of the country, as well as those interests which concern individual safety and property rights, cannot be ignored.

The writer has no personal interest in this question other than any other citizen. He has taken no brief on the subject—is not interested as a stockholder, or officer or counsel in that line. The wisdom of the wisest it is deemed is able to reach a solution that will bring no dangerous collision of classes on the subject, or jeopardize settled lines of business and prosperity.

*Alfred Hand,  
Justice of Supreme Court of Penn.*



## THE BRUNSWICK SUCCESSION

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The recent death of Prince Albert of Prussia, regent of the duchy of Brunswick, has served to once more bring into prominence certain political and constitutional questions severely agitated when, in 1884, the last duke of the elder branch of Brunswick-Luneburg, passed away, leaving the throne open, under the terms of ancient succession-agreements, to the younger line of the house now represented by the duke of Cumberland. This latter prince would, doubtless, have been chosen as a matter of course had not the further question of his hereditary claims upon Hanover, a province of Prussia since its incorporation by that power following the surrender at Langensalza in 1866, introduced features which have led the imperial government to deny his constitutional eligibility. The duke's father, formerly reigned over Hanover as King George V, and was a son of that Ernest Augustus, younger brother of William IV of England, who, in 1837, succeeded to the crown of Hanover, Queen Victoria being excluded from a succession vested by law in the male line. The house of Brunswick is the modern representative of the ancient Guelphs (*Welfen*) whose name, borne to-day by a small political faction in the Reichstag, stands for a general opposition to things Prussian, and takes practical shape in an uncompromising support of the duke's apparent design to acquire his Hanoverian family possessions. The success of such an intention would plainly constitute a serious impairment of Prussia's territorial integrity, and, in this light, it was declared by a solemn decree of the Imperial Federal Council, (*Bundesrat*) made July 2, 1885, to be contrary to both the treaty-agreements (*Bündnisverträge*) upon which the North German Confederation and the Empire are erected, and to the Imperial Constitution itself. Thus it was that the duke was passed over as a candidate until he should renounce all intention upon Hanover, and the provisional plan (*Provisorium*) of a regency was adopted with Prince Albert at its head. To indefinitely perpetuate such a system is regarded by the ministry and local assembly (*Landtag*) of Brunswick as highly undesirable; a temporary council of regency with the president of the local ministry as its chairman has therefore been placed in charge of the ducal government and the

Landtag has unanimously resolved<sup>1</sup> to invoke the supreme authority of the Bundesrat touching a final settlement of the entire matter. Both the duke and the Landtag agree that the imperial council is constitutionally qualified to adjust the succession, but hitherto no promise has been obtained from the duke that he will renounce his Hanoverian claim as a condition precedent to his election as sovereign of Brunswick. Prince von Bülow,—Chancellor of the Empire, chairman of the Bundesrat, and Prussian minister of foreign affairs,—has publicly declared in reply to the Landtag's written request that he bring the matter before the Council, that as *Chancellor* he must abide by the resolution of July 2, 1885, to wit, "that the installation of the duke in Brunswick is considered at war with the ground principles of the original treaties of union and with the imperial constitution;" speaking, too, as *Prussian* minister, the prince adds, that without a definite renouncement on the duke's part of all Guelphic ambitions it is directly contrary to Prussian interests that a neighboring state of the empire be placed under the government of a member of a family aiming at Prussia's disintegration.<sup>2</sup> In assuming these positions Chancellor Von Bülow has the unqualified support of the Kaiser who has written to his cousin the duke that the government must decline to countenance any reopening of the question by the Bundesrat.

To the student of comparative constitutional jurisprudence the feature possessing the greatest interest in a case complicated by dynastic and political aspects as well as by those purely constitutional, consists in the affirmance by the Kaiser and his chancellor of the stand taken in 1885 and which resulted in the duke's exclusion upon the sole ground that his political attitude must be held to contravene the Bündnisverträge (*treaty-agreements*) upon which the imperial organization in a measure rests. What, then, are these

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1. Prince Albert died September 13th, 1906; he was chosen regent October 21st, 1885. Immediately on his decease a council of regency composed of the president of the local ministry, two associates of the Ministerium, the president of the local assembly (Landtag), and the chairman of the local Appellate Court (Oberlandesgericht). This council at once called the legislature together, and that body (September 25th, 1906) unanimously resolved to request a settlement of the succession question by the imperial Bundesrat.

2. "Als Reichskanzler muss ich den Beschluss des Bundesraths vom 2. Juli, 1885—dass die Regierung des Herzogs von Cumberland in Braunschweig mit den Grundprinzipien der Bündnisverträge und der Reichsverfassung unvereinbar ist—so lange als massgebend behandeln, als er nicht durch einen neuen Beschluss des Bundesraths aufgehoben oder abgeändert worden ist," u. s. w. (Berlin despatch to the *New York Staats Zeitung*, Oct. 5, 1906.)

agreements? And why, in a federal state organized upon the basis of a written constitution should primary treaties between the sovereign elements now united to form an empire be appealed to as the ground of an important constitutional decision?

To answer the question is to appreciate the radical difference between such a state (*Bundesstaat*) as the German Empire and the United States of America viewed in the light of their constituent elements and the plan which unites these to form a new governmental organization. It is to be remembered, in the first place, that the North German Confederation took its constitutional rise in an alliance (*Bündnisvertrag*) concluded August 18, 1866, at the close of the war with Austria, between Prussia and sundry North German states by which a relation offensive and defensive was entered into on the basis of certain outlines (*Grundzüge*) announced by Prussia on the 10th of June previous for the preservation of the independence and integrity of the contracting sovereignties;<sup>3</sup> this treaty was succeeded in the following year by the formal constitution of the confederation promulgated July 26, 1867. The latter document was subsequently amended by the addition of sundry provisions agreed upon in the late autumn of 1870 at Versailles between the confederate authorities and those of the states south of the River Main,—namely: Baden, Hesse, Wurtenburg, and Bavaria;—and further changed, in consequence of the understanding arrived at early in December following at Berlin between the North German Bundesrat and plenipotentiaries from these other states, by the announcement that thereafter the Bund should be known as the Empire, and its president as German Emperor, Prussia, as before, assuming the position of permanent *Praesidium* of the new imperial alliance. As thus modified it forms the constitution of the *empire*, and was ratified by the governments of the new states thus entering the combination and by the Reichstag at Berlin, and promulgated in April, 1871.<sup>4</sup> In this manner the original *Bündnisverträge* became transformed into a constitution—(*Verfassung*),—and while it would seem that the original treaty between the North German states,—among which were Prussia and Brunswick,—must be constitutionally considered as merged in the organic plan subsequently adopted, nevertheless its *spirit* at least is to be

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3. Binding, *Deutsche Staatsgrundgesetze*, (Leipzig, 1904), p. 69-73.

4. Meyer, (*Lehrbuch des deutschen Staatsrechts*) p. 143, "Die Gründung des deutschen Reichs," gives the clearest account; F. Arndt's brilliant summary in his *Verfassung des deutschen Reichs*, *Einleitung: Errichtung des deutschen Reiches*, p. 42, *seq.*

regarded as permanently controlling; with reference to the treaties of November 1870, which directly looked to the incorporation of the South German states with the existing confederation north of the Main and are therefore termed in the parlance of German public law *Verfassungsverträge* it is to be noted that sundry provisions have been *directly* transferred from their texts to that of the present imperial constitution. Thus the organic basis of the empire is seen to present a *treaty* aspect destined to form a determinant element in its construction; in other words, the constitution is to be read not alone in the light of its text but in that of the spirit also of its immediate predecessors. Furthermore, we observe that the body to which a final construction in the case of the Brunswick succession is assigned both by the constitution as well as by the nature of the imperial organization,—itself an expanded confederation and not a union indissoluble resting upon a concrete organic law for its support,—is the high council which represents the combined sovereignty of the allied *states* of the empire,<sup>5</sup> thus linking it in underlying theory to the Congress of the old American Confederation rather than with any organ of the new government planned in 1787. Modern Germany has, indeed, advanced in its political structure far beyond the mere alliance,—*Staatenbund*,<sup>6</sup>—organized in 1815, although between the present organization and that of the pictur-

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5. "Im Bundesrath übt die Gesamtheit der Bundesregierungen die souveräne Reichsgewalt aus. Ihm gebührt deshalb neben der Mitwirkung bei der Reichsgesetzgebung auch ihre Vorbereitung und, soweit sie nicht dem Kaiser besonders zugewiesen ist, ihre Ausführung." (H. L. Grais, *Handbuch der Verfassung*, p. 17, Berlin, 1906.)

6. Of *Bundestaat* and *Staatenbund* much has been written, and yet it seems doubtful whether the leading writers on public law in Germany and England have firmly grasped our American conception of *Bundesstaat* as a *citizen-union* in the sense expounded by Chief-Justice Marshall when he observed (speaking for the Supreme Court in *McCulloch v. Maryland*, 4 Wheaton, 316, 402-403): "the counsel for the state of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument, not as emanating from the people but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states who alone possess supreme dominion. It would be difficult to sustain this proposition," etc.

On the development, in German jurisprudence, of the conceptions in F. H. Rehm in Marquardsen-Seydel's *Handbuch des Oeffentlichen Rechts*, Vol. I, *Allgemeine Staatslehre*, p. 86: "*Bundesstaat* und *Staatenbund*." The term *Staatenbund* first appeared in German legal literature when Napoleon formed the Confederation of the Rhine and thus announced the downfall of the Romano-Germanic empire.

esque empire which laid down in 1806 its claims to be the successor of Rome the interval is not so great as that separating the imperial federal state (Bundesstaat) in its ground-plan from the American Union, which latter is likewise a Bundesstaat though built on another foundation. True, the empire is clothed with the attribute of legal personality, it promulgates its own legislation,<sup>7</sup> and, at the command of its sovereign council a recalcitrant member may be constitutionally coerced,<sup>8</sup> while it has, too, a representative assembly chosen by direct vote of the people throughout its states. Despite all this, however, the preponderance of its steel-clad *Praesidium* affords beyond all contestation a stronger guaranty of permanence than the elaborate constitutional structure which has not escaped elements of weakness inherent in every *league*, and which are ever ready to yield on the one hand to the spirit of separatism, or, on the other,—as in the case of Athens and her maritime allies long ago,—to the despotic imperium,—*ἀρχή*,—of the strongest member. That our own constitutional plan, on the contrary, is one which appeals pre-eminently to the sanctions of *law*, was strikingly shown when a few years since a dispute touching the succession to the highest magistracy in Nebraska was peacefully taken cognizance of by the Supreme Court of the United States,—one only of the justices doubting whether “this court has any jurisdiction to determine a disputed question as to the right to the governorship of a state, however that question may be decided by its authorities.

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7. Arndt, Einleitung, p. 55.

8. By the process termed *Execution*, [Reichsverfassung, article 19.]

“Für die Auslegung der Verfassung ist noch zu beachten, dass sie aus Verträgen (den August [1866] und November-Verträgen [1870] entstanden ist, dass die auf einen Vertrag hinweisenden Bezeichnungen in dem Verfassungstexte zwar noch beibehalten sind, dass sie aber durch die Uebnahme in diesen Text aufgehört haben, Vertragsrecht zu sein und Verfassungsrecht geworden sind. Ist nun das deutsche Reich ein Staatenbund oder ein Bundesstaat? Die Antwort hierauf ist, es ist ein Bundesstaat in dem Sinne, wie dieses Wort von Theorie und Praxis verstanden zu werden pflegte. . . . Hierbei ist jedoch zu beachten, dass die Grenzlinien zwischen Bundesstaat und Staatenbund fließende sind . . . . Wichtiger als manche theoretischen Sätze ist die Präponderanz Preussens nach Ausschluss Oesterreichs.” (Arndt, *ibid.* p. 54, 55). “Der Staatenbund,” says H. L. Grais (Handbuch, p. 9, note 1), “ist ein völkerrechtliches, der Bundesstaat ein staatsrechtliches Gebilde; ersterer bildet ein Rechtsverhältnis, letzterer eine Persönlichkeit.—Staatenbunde waren der deutsche Bund und die Schweiz von 1848, Bundesstaaten sind das Deutsche Reich, die heutige Schweiz und die vereinigten Staaten von Nordamerika.”

The ancient term for Switzerland was “land of the oath-bound confederates.” B. d. Eigenossen.

9. *Boyd v. Nebraska ex rel. Thayer* (Feb. 1, 1892) 143 U. S. 135, 182.

The fact that one of the qualifications prescribed by the state for its officers—(alluding to the claimed *naturalization* of one of the parties to the cause)—“can only be ascertained and established by considering the provisions of a law of the United States in no respect authorizes an interference by the general government with the state action.”<sup>9</sup> But the remaining justices thought the judicial arm of the government constitutionally able to determine such an issue; the operation of an Act of Congress,—a national statute—being drawn in question the highest tribunal of the nation has jurisdiction. Quite another principle is exhibited in the German Bundesrat’s position in the case of Brunswick, and also in that of the succession in Lippe some ten years since where the imperial council (denying the competence of the Supreme Court,—Reichsgericht) referred the contestants to a board of *arbitration*—selected from the Reichsgericht judges under the presidency of the King of Saxony. We are here reminded, indeed, of the reference on the part of our old Congress of state boundary-disputes to *commissioners* whose conclusions, however,—signally in the Wyoming case,—lacked an *executive* to carry them out. While Germany has the required power of enforcement under article 19 of its constitution, it is a recalcitrant *state* which may be thus coerced—the members of the empire (Bundesglieder) being the state corporations. These are quite properly made constitutionally amenable to the council (Bundesrat) consisting of instructed delegates from their governments, and it is clearly, too, within the competence of these delegates to control an issue,—such as that raised in the Brunswick case,—where members of the imperial league claim privileges vitally affecting their respective sovereignties. And such would rightly appear to be the Bundesrat’s province even were it held that section 76 of the constitution (giving cognizance in state disputes other than those of a private-law nature) does not support the council’s jurisdiction. In the Lippe case the jurisdiction seems doubtful, since there the personal qualifications of the throne claimants were contested; in the Brunswick succession it is Prussia’s constitutional right to its territorial integrity which the Praesidium holds menaced and the issue thus becomes referable to the primal treaty of the North-German Bund stamping the empire as purely federal both in origin and constitutional organization and not to be identified with a structure national in its conception.

Gordon E. Sherman,  
of the New Jersey Bar.

## THE PROFESSION IN THE POLITICAL HISTORY OF THE UNITED STATES.

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It hardly seems possible that thirty years have passed since I sat in the body of the old Center Church and listened with the other members of the graduating class of '76 to the address delivered on that occasion by one of Yale's famous sons.

I have always been a firm believer in the Yale pluck and the Yale grit—pluck and grit which time and again have forced the Yale boat first across the line and secured the necessary touch-down or the winning run when defeat seemed almost certain. I have always cherished a deep affection for the old Yale institutions and have always had a warm spot in my heart for Yale men, and so when Dean Rogers extended to me an invitation to deliver the annual address this year, I accepted his invitation with pleasure feeling that I should like at least once more to visit the old scenes and renew old friendships.

There are many interesting subjects which doubtless will engage your attention in the near future of which, as head of that department of the government over which I have the honor to preside, I have information, and about which I might properly on this occasion talk to you. There is the great and new policy of governmental control of corporations engaged in interstate commerce. There is the control of vessels in the interest of adequate protection to life and property. There is the promotion and development of our internal and foreign commerce, the extending of our manufacturing interests and the establishing of new markets for our manufactures—manufactures, the annual value of which reaches the gigantic sum of \$15,000,000,000, a value approximately equal to that of the manufactured products of Great Britain, France and Germany combined, and then there is the great and important question of restriction, in the interest of American citizenship and American labor, of foreign immigration. Any of these subjects would afford material for a useful and interesting address on this occasion, but inasmuch as you young men have chosen the law as your profession, it seemed to me, when I came to consider the subject of this address that it might be more interesting to you to have me say something on this occasion concerning the extraordinary part that the legal

profession has played in the political history of this country. It may well be said that from the Declaration of Independence down to the present time the lawyers have been the mainstay of this government, for it was their genius that conceived and brought into existence the Declaration of Independence, and it was their knowledge of English law and institutions that gave to us the Constitution which stands to-day as the world's masterpiece of statesmanship.

In discussing this subject I shall attempt to measure the service and the influence of the lawyer by certain concrete standards in comparison with, but not in disparagement of, the similar service and influence of the men of other professions and occupations. When we look beneath the surface of events and examine into the personal history of the men who are prominent in them, we discover the unique part which the lawyer has played in the constitutional, executive, legislative and judicial history of this nation and we are necessarily driven to the conclusion that this is no accident or coincidence. There is something about the profession of the law which not only attracts the best intellects but especially equips the men trained in that profession to render the most effective public service. A long procession of men has passed in and out of the public since the government was founded and the vast majority of them have gone from the state of contemporary fame into the semi-oblivion of the family genealogy, the Congressional Records and Lanman's Annals of Congress. In the latter publication appear the names of some 6,600 men, each of whom, in his day, possessed sufficient standing and influence in his own community to lead to his selection out of thousands and hundreds of thousands of neighbors to represent his state or district in the halls of Congress. Many of these men were sent to Congress, not once, but many times, and many have died in harness after long years of useful, effective and patriotic service.

But as we turn the pages of this volume, we are impressed, first with the comparatively small number whose services have been so exceptional in character, and so potential in determining great results, that their names stand out on the blackboard of history and are recognized by students as decisive factors in our national development.

If our examination is confined to the men whose names are familiarly known to the average citizen; who are frequently referred to in the historical works of schools, colleges and universities; whose names figure in the text-books on American history, the number is still further reduced. We cannot count them on the fingers of both hands, or in twice the number of fingers; but if you were called



upon, off-hand, to name the one hundred men who have rendered the greatest service to the nation, it would trouble you to enumerate the full number; and after the first fifty names there would be no agreement among you as to the second fifty. But in one respect there would certainly be agreement of the first fifty upon whom all agreed, ninety per cent would be lawyers, and of the second fifty, upon whom very few of you would agree, ninety-five per cent of the names suggested would be those of men who came into the public service out of the legal profession.

That profession, gentlemen, and I make this statement without fear of contradiction, has contributed more towards the building up of our constitutional system and the orderly and effective development of the American idea of the representative form of government than all other professions and occupations combined. This fact was recognized and accounted for by the first and ablest critic of American institutions, Alexis de Tocquevill, when he said that "the authority the Americans have intrusted to members of the legal profession and the influence they exercise in the government is the most powerful existing security against the excesses of democracy."

These words were written in the early thirties and seventy-five years of further experience have but confirmed and emphasized them. The demonstration of the fact carries us back into the colonial days and into the momentous period when the principles that led to the Declaration of Independence and that are embedded in the Constitution were taking form and shape.

Six of the fourteen presidents of the Continental Congress were lawyers. Of the fifty-six signers of the Declaration of Independence, twenty-eight were lawyers. Sturdy John Hancock, whose name was writ first and largest on the immortal document, was one of the merchant princes of colonial Boston, and there were farmers and doctors and other professional men among them.

It was a lawyer who first moved in the Continental Congress that the thirteen colonies be declared independent. The committee appointed to draft the declaration, with but one exception, namely, Benjamin Franklin, were lawyers, and a lawyer, Thomas Jefferson, the chairman of the committee, drafted the declaration which, after approval by the committee, was reported to and adopted by the Congress. The next historic group who set another mile-stone in our history was the convention which framed the Federal Constitution.

Fifty-five of the men elected to that body qualified and participated in its proceedings, and of these thirty-four were lawyers. The

preponderance of lawyers in that convention was not surprising in view of the exceptional character of the duty entrusted to it. Proper equipment for that duty could only come from a thorough training in the law in the broadest significance of the word. These men were met to frame a form of government which should embody the best results of the experience of all the world, in all the experiments in representative and constitutional government anywhere undertaken from the beginnings of recorded history.

They needed knowledge of every system of administration, of legislation, of jurisprudence, which had ever been tested either to failure or to success. They needed knowledge of the common law which had embedded itself in the custom of the nations, and especially that of England, which had governed the colonial affairs in each of the original thirteen colonies.

The Constitution evolved by this Convention was an epitome of the experience in government which had preceded its construction, supplemented by an adaptation of the several colonial or state systems in vogue to the Federal system to be superimposed thereon. Only a man learned in the law and especially versed in the judicial experience of Europe was competent to approach the problems that confronted the Constitutional Convention.

The close student of the debates out of which was forged the Federal Constitution, knows that the instrument in its final shape is almost wholly the work of its members with legal training. They comprised nearly two-thirds of the actual membership; they represented nine-tenths of its effective and concrete work. Nor is it surprising, in view of his omniverous reading and remarkable knowledge of historical experience and experiment along these lines, that Alexander Hamilton should have exerted so great an influence in the framing of the Constitution. Not even yet, after the lapse of all these years, do we recognize the fullness of our debt to that wonderful mind. The Federal Constitution was the contribution of the legal profession to the new-born nation and it has been well designated "as the most wonderful product struck off at a given time by the brain and purpose of man."

Washington, the first president, surrounded himself with a notable cabinet, all of whom were lawyers save Samuel Osgood and General Henry Knox, the great soldier and Washington's personal friend. In some measure at least the success of that first administration—its self-poise and conservatism, directing the ship of state through waters never navigated before—was due to the fact that among his counsellors were two men so diametrically opposite in

their intellectual point of view as Hamilton and Jefferson; and that Washington knew how to steer the middle course between them.

No less notable was his second cabinet in which ten persons served in all, six of whom were lawyers.

We must come forward seventy years to the period of another crisis in our history not less trying and tempestuous to find this situation duplicated. Abraham Lincoln surrounded himself by a cabinet, every member of which except Simon Cameron, whose stay was brief, had won distinction primarily through his successes at the Bar. The future historian, without in any way detracting from the consummate genius of Lincoln, himself a great lawyer, or from the influence of his own unique personality in that supreme crisis, will accord to three of the eminent lawyers who advised him, Seward, Chase and Stanton, a larger share of responsibility than has yet been awarded them.

Twenty-five men have been called upon to preside over the destinies of this nation since it was founded. Twenty-one of them the first choice of the people, four succeeding to the office on the death of the president. Of these twenty-five presidents twenty were trained in the profession of law. Five only came from all other professions and occupations combined. Eighty per cent of the presidents were bred lawyers. Of the small remainder four were soldiers, great and successful generals in the few wars in which the United States has been compelled to engage, and one of them, how shall we designate him, author, publicist, man of affairs, student of civic conditions, man of transcendent genius. What a wonderful lawyer the profession missed when Theodore Roosevelt did not have time to include the study of law among his other manifold mental activities.

These twenty-five presidents have chosen for cabinet advisers, two hundred and thirty-eight persons in all. Of these two hundred and thirty-eight cabinet officers one hundred and eighty-three were lawyers, leaving only fifty-five belonging to other walks in life.

The lawyer has been no less strikingly preferred for the great office of the vice-presidency. Twenty-six men have been elected to that office, nineteen of whom were lawyers and seven of whom came from all other professions and occupations.

Let us then sum up this rather noteworthy record. Of the presidents, eighty per cent have been lawyers; of the vice-presidents, seventy-three per cent and of the cabinet officers, seventy-seven per cent. The House of Representatives has had thirty-five speakers, of whom twenty-five or seventy-one per cent were lawyers. It must

be something more than a coincidence that these percentages run so equal.

When we come to consider the legislative branch of the government we find that the occupations of the members of Congress during the whole period of our constitutional government reveal the preponderating influence of the legal profession in a manner only less striking than the executive branch. I have not studied the details for all of the Congresses, but I have gone into the analysis far enough to show that this preponderance has not greatly varied in the fifty-nine Congresses. There were seventy-two members of the first Congress, and forty-five of them, or sixty-two and five-tenths per cent were lawyers, many of them the men who had been trained to their work by service in the Convention which framed the Constitution. All other occupations combined furnished but twenty-seven members of that historic body representing thirty-seven and five-tenths per cent of the number.

Jumping forward eighty years to the forty-first Congress elected in 1870, when the membership had increased to three hundred and seventeen, we find one hundred and eighty-six lawyers in the two branches, or fifty-eight and seven-tenths per cent. All the other occupations combined supplying but one hundred and thirty-one senators and members. Twenty years later in the fifty-first Congress, elected in 1890, the membership had increased twenty-five per cent to four hundred and fifteen and of this number two hundred and eighty-nine or sixty-nine and six-tenths per cent were lawyers. Their preponderance was thus increasing and the statistics of the present Congress, the fifty-ninth, indicate that the public confidence in the lawyer, as the citizen best equipped to render effective service in legislation is confirmed and is increasing. The fifty-ninth Congress has four hundred and seventy-six members of both Houses of whom three hundred and twenty-three are lawyers, representing sixty-seven and six-tenths per cent of the entire membership.

It remains now to make brief reference to the *personnel* of the third co-ordinate branch of the government, the judiciary. The crowning defect in the government under the Articles of Confederation was the absence of any judicial power. The Constitution remedied that defect and gave to us the Supreme Court of the United States which has been well termed "the bulwark of American liberty."

All of the judges have necessarily been drawn from the legal profession. Names like Marshall, Story and Chase recall the vital

service the Supreme Court has rendered in the critical periods of our history. They have blazed the narrow pathway of federal development; they have outlined and perpetuated the proper equilibrium between these two perpetually antagonistic elements in our dual system; they have marked out the limitations upon representative government with a clearness never before defined. In the brief period of our national existence the Federal Constitution has been perfected, its methods of administration improved, its faculties enlarged, its powers tested, and the limits of its authority and jurisdiction ascertained and established, and this we owe, not wholly, but in a pre-eminent degree to the Federal Judiciary, a body of quiet, trained, conservative men, of cloistered life and patriotic instincts both in the higher and lower courts, the great mass of whom are unknown to the general public even by name.

It is not so easy to trace the influence of the lawyer in the affairs of the states. Many great men whose names are household words have filled the governors' chairs. Many of those whose service in the national field has been distinguished were trained and developed for that higher service in the state legislatures. But such statistics as are available reveal that the lawyer occupies no such unique relationship to the government of the states as has appeared in that of the nation. His numerical strength in the state legislatures is often rather below than above the normal. From such of the state year-books as carry these details, the year 1900 being taken as a fair illustration, the followed table has been compiled which may be accepted as indicative of the situation in all the states.

Connecticut,	total membership, 276, lawyers, 22, per cent of total, 8.
Michigan,	total membership, 132, lawyers, 28, per cent of total, 21.2
Minnesota,	total membership, 182, lawyers, 46, per cent of total, 25.3
New Jersey,	total membership, 93, lawyers, 39, per cent of total, 41.9
Ohio,	total membership, 150, lawyers, 40, per cent of total, 27.7
Pennsylvania,	total membership, 254, lawyers, 46, per cent of total, 18.1
Rhode Island,	total membership, 108, lawyers, 13, per cent of total, 12.
Vermont,	total membership, 275, lawyers, 23, per cent of total, 8.4
Wisconsin,	total membership, 133, lawyers, 28, per cent of total, 21.1

showing a decided fluctuation in the proportion of lawyers in different states. It may safely be claimed that the states would be the gainers if the legal profession were more fully represented in the legislatures. The first result of such a change would be a decrease in the volume of legislation which comes from these bodies. The growing multiplicity of these session laws is one of the great evils of the times. Crude measures, special laws, unnecessary legislation

encumber the statute books and complicate the administration of justice throughout the country.

The function of the lawyer in the state legislatures is to formulate the phraseology of these laws, to eliminate those which conflict with each other, to point out those which are redundant and trivial, to prevent rather than to increase the number, and above all to bring the codes of laws of all the states into something like harmony and consistency. Uniform laws on the great fundamental subjects of legislation is the goal towards which all the states of the Union must steadily and persistently aim if we are to expect like conditions of civil liberty, of personal rights and responsibilities and of social progress in all parts of the Union. It is in this great field of co-ordinating the civil and penal codes of all the American states that the lawyer can render his greatest public service and he finds his best professional opportunity. I esteem it the duty of the young lawyer to welcome opportunity to serve his state in its legislative bodies. There is no training open to him which better fits him to construe the law and to serve his clients. It is also a service he owes to the state.

But there is another service, even more important, from which the lawyer is too apt to shrink and where his special training is always needed and too often missing. I refer to the minor legislative and local bodies and boards, which so largely determine for every community whether its government is good or bad, the Aldermanic Boards, the Common Councils, the selectmen, the supervisors, not to speak of the administrative and executive offices.

Here, in my judgment, is the lawyer's greatest field of usefulness; here he ought to be willing to serve the public even at a sacrifice as his contribution to the public weal. Service in these capacities is often eagerly sought by others, not always from the best motives, and is generally shunned by the lawyer. Not that he is indifferent to his duties as a citizen but rather because he fails to realize that this form of public service, relatively humble as it is, is the place where the community stands most in need of the trained and educated man with a true conception of the proper functions of the public officer and the limitations upon his power.

In the earlier days and down to the settlement of the problems growing out of the Civil War the great questions that engrossed the time of Congress were of a character political or constitutional in their nature. The lawyer was peculiarly gifted, by training and habit of mind, to deal with these questions and he did deal with them in masterful manner. A striking change has come in the nature of

the problems that now demand legislation. All the great constitutional issues are determined, great economic issues are taking their place, and are increasingly the subjects of national legislation.

Such matters as the regulation of railway rates, the relations of corporate capital to public rights and private enterprise, the extension of our foreign markets, the organization of labor, questions which have to do with business, with commerce, with national development, with material growth, with social welfare and progress are pressing persistently to the front.

In all these matters the strictly legal training is still helpful and in fact indispensable. But the query may properly be suggested, and more properly in this presence than anywhere else, whether the conventional training given to the American lawyer is sufficiently broad to equip him for the best discharge of the public duties which will continue to fall upon him. It is still a course confined exclusively to the technique of law. May not the question properly be raised whether, in the multiform development of modern civilization and the intimate relationship the lawyer must always bear to it, the special training the law schools give him should not be somewhat broadened—whether he should not be trained in the school of modern economic thought, and along the line of modern business experience as well as in book and case law?

No people on the face of the globe can present such a wonderful record of commercial and industrial growth and prosperity as the people of the United States. We have increased enormously in population but our increase in wealth has more than kept pace with our increase in population. Business methods have changed and the education and training of the lawyer should be such as to enable him to cope with the changed conditions in the business world. This is an age of progress; modern science and the inventive genius of man have revolutionized old methods and the lawyer who expects to succeed in the practice of his profession must study modern methods and prepare himself to meet modern conditions.

Magnificent as has been the work of our profession thus briefly outlined, I would not have it thought that I am in any way belittling the invaluable services which have been rendered to nation and state by members of the other learned professions and by those in business walks of life. But this is an address to lawyers about lawyers. You would expect to find the ocean the dominant feature of a marine picture, and a mountain landscape which contained no mountains would scarcely come up to the standard. But no sense of proportion is lost in a marine landscape, no one supposes that the whole

world is ocean, nor should anyone understand me as meaning or implying that all work that is good has come out of the profession of the law. The truth still remains, however, that the services of the lawyer have been sought for and have proved more valuable than the services of any other profession. Nor are the reasons far to seek. Upon the surface stands the fact that by their training lawyers become close reasoners, and are taught to strip off the non-essential husks to reach the vital kernel. In the framing of the laws, therefore, they are and should be exceptionally expert. Their experience teaches them also what new legislation may be required. But more important than all this is the fact that by contact with all kinds and classes of our citizens they come to know the needs of all, to be tolerant of the shortcomings of all, to unite a tactfulness with that tolerance, to become, in short, "the many-sided man." 'Tis for the reason that lawyers are many-sided men that their services have been, and always will be, in such great requisition in the governmental matters of the nation.

You young men are leaving the portals of your *Alma Mater* and are about to enter upon a career in which success will depend to a very great degree upon your own efforts. You will encounter many hard knocks, possibly many defeats, in the struggle for supremacy, but bear in mind that there is always room at the top for one more and that grit and energy and perseverance, coupled with ability, will in the long run win out. Above all things learn to rely upon your own judgment and bear in mind that it is not the duty of the lawyer to encourage but if possible to prevent litigation. Remember that you are now members of the legal profession, a profession that has given to the nation most of its great men and which has at all times and on all occasions stood for the liberty of the subject and the equality of all before the law. It is indeed a profession in which the most splendid talents and consummate virtue may well press onward eager to bear a part. Its record is one of noble acts, of great achievements and of unselfish devotion. Let no act of yours then sully that record. Bear in mind that our system of government is, in the main, the work of the American lawyer and that, with but few exceptions, from the foundation of our government to the present time "his hand has guided our ship of state and his brain and genius formulated our liberties."

Hon. Victor H. Metcalf,  
Secretary Commerce and Labor.



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## DAMAGES FOR DELAY IN TRANSMITTING MESSAGES.

In *Lucas v. Western Union Telegraph Company* decided in the Iowa Court of Appeals and reported in 109 N. W. 191, the defendant was sued to recover profits claimed to have been lost in a real estate transaction because of defendant's negligence in failing to deliver a telegram. Although the court does not hold directly that such profits might be recovered, certainly its opinion permits of such an inference. The question is not a new one and has been decided frequently before, but unfortunately, the decisions are not harmonious.

As to the amount of damages recoverable in general for the breach of a contract, the rule is that the offending party shall be liable only for such damages as the parties may be supposed to have contemplated would follow its violation. *Leonard v. New York, Buffalo and Albany Telegraph Company*, 41 N. Y. 544; *Curtin v. Western Union Telegraph Company*, 36 N. Y. Supp. 111. This general rule is well recognized, but in its application to damages in these cases the courts have found difficulty. While telegraph companies and common carriers are analogous in some respects it is generally held that the former are not absolute insurers of the proper transmissions of a message. *N. Y. and W. Printing Telegraph Company v. Dryburg*, 35 Pa. 398, as to whether their liability is or is not that of a common carrier it is important to decide. If telegraph companies are to be considered as common carriers, their liability is that of an insurer, and logically, they should be required to make full indemnity for actual loss sustained. In the case of

*Parkes v. The Alta Cal. Telegraph Company*, 13 Cal. 422, decided about 1860, the defendant was held liable for damages resulting from the loss of an attachment because of its failure to deliver a message promptly. The court in this case expressly held the telegraph company to be a common carrier. On the other hand, the case of *De Rutte v. The N. Y. and Albany and Buffalo Telegraph Company*, 1 Daly 547, decided about 1866, held that telegraph companies are not common carriers, but they should be held to a stricter accountability than mere bailees, and any delay or error should be presumed to have been due to their negligence.

In the principal case, the Court of Appeals in an opinion by Ladd, Judge, says: "If because of unreasonable delay in the acceptance, the contract was not completed, then it was for the jury to say whether the defendant was negligent in transmitting the message, and owing to this plaintiff lost the benefit of entering into the contract." The inference is, the defendant is liable for the amount lost in the transaction if the jury finds that it resulted from the negligence of the defendant company. It is this rule of damages, we think, as apparently laid down in the opinion that is open to criticism. The tendency of the courts at present seems to limit the liability of the telegraph company to the cost of the message unless the message itself may be presumed to fairly appraise the company of its importance and the damages which might ensue from their failure to deliver accurately and promptly. For failure to deliver a cipher message correctly the authorities are almost universal in holding that nominal damages only may be recovered, because such message does not appraise the company of its importance, so we think the rule would be the same in the case of any message which do not inform the defendant of the nature of the transaction involved. There are many cases holding this application of the rule of damages as the correct one. *Primrose v. The Western Union Telegraph Co.*, 154 U. S. 1; *Western Union Telegraph Co. v. Coggin*, 68 Fed. 137; *Candee v. Western Union Telegraph Co.*, 34 Wis. 471; *Merrill v. Western Union Telegraph Co.*, 78 Maine, 97.

With the rule of damages allowing such as may have been reasonably contemplated by the parties from a breach of their contract, it seems with all deference to the Ohio Court of Appeals, that the question to be submitted to the jury is, whether or not the telegram sent could be presumed to fairly appraise the company of its significance and the damage that a non-delivery would cause. A telegraph company could not reasonably be supposed to render itself liable for large damages at the ordinary rate of transmission especially when they have no knowledge of what would be the result of their failure to deliver. It is conceded that a telegraph company in all cases may defend their failure to deliver because of an act of God and may avail themselves of such defenses as common carriers have. True, there are many cases in accord with the view laid down by the Ohio courts. But it is plain that this application of the rule carried to its logical extreme, must necessarily work great injustice to the telegraph companies and render them liable to amounts far beyond what their rates of transmission would warrant.

## INCREASE OF CAPITAL STOCK OF A CORPORATION—PRIMARY RIGHT OF AN ORIGINAL STOCKHOLDER TO PURCHASE NEW STOCK.

In the case of *Stokes v. Continental Trust Co.*, decided in the New York Court of Appeals on November 13th, 1906, a question was decided which will certainly bear much discussion.

In that case, Stokes, the appellant, was the owner of 221 shares of the original stock of the Trust Company, out of a total of 5,000 shares at par value of \$100 each.

It was not questioned that the company was exceedingly prosperous and that it was unnecessary to issue any more stock except as it might be for the best interest of the stockholders. Blair & Company, a firm of private bankers, said to be representing Marshall Field and others, proposed to the directors of the Trust Company that the number of shares be increased from the original number of 5,000 shares to 10,000 shares; the capital from \$500,000 to \$1,000,000; and that *all* the addition—5,000 shares—be sold to Blair & Company at \$450 per share, with the condition that the buyers be allowed to name ten of the twenty-one trustees to be chosen at the next meeting. The bonus offered was, therefore, \$350 on each share. The proposition was accepted by the directors and a special meeting duly warned and called and, by a vote of 4,197 shares of the original stock, the deal was put through. Stokes, the appellant, knew the object of the meeting, attended it and agreed to the increase of stock—but objected to the sale to Blair & Company. He then demanded the right to buy as many of the new shares as his holding of the original shares bore proportion to the whole number. The directors agreed to take his proposition under consideration and later the entire new issue was sold to Blair & Company at the agreed price—\$450 per share. At the time of the sale the book value of the stock was \$309.69 per share; the market value \$550, and at the time of the first trial the price had risen to \$700 per share.

Stokes sued for damages for the failure to deliver the stock according to his offer—221 shares at \$100 each. The trial court awarded him the difference between the market value and par value on the day of the sale, \$450 for each share to which he was entitled. The Appellate Division reversed the decision, allowing him no damages, and the Court of Appeals modified the former holding, allowing him the difference between the price set by the directors in the sale to Blair & Company—\$450—and the market value of the day of the sale which was \$550, a difference of \$100 per share.

It was decided, with little contention, that the appellant had the legal right to subscribe for and take the same number of shares of the new stock that he held of the old, as the new issue corresponded exactly with the original issue in number of shares. The text-books and reported cases show a few cases to the contrary, but a careful reading of these cases show that the holding is correct at common law—the cases cited involving generally the construction of statutes. Now comes a rather anomalous holding. From the facts it appears that the rapid increase in the value of the shares was directly attributable to the offer of Blair & Company, who were the

representatives of Marshall Field & Company, and other strong interests, and that this offer was noised about the financial circles. Appellant was willing to have the stock increased—though there was no other reason for the increase than this offer—and, though it does not clearly so appear, also agreed that if 221 shares were sold to him (appellant) at par, the balance might be sold to Blair & Company, or any one else. Judge Vann, in the majority opinion, held that the company had an undisputed right to place a price of \$450 each on the shares and that, even if the appellant had the right which he claimed to buy the shares, he must pay—not the par value—but the price set by the company. It is to be regretted that this point was not gone into more fully. No case sustaining the holding is cited and a search of the authorities seems to hold the other way. In a carefully written dissenting opinion, Judge Haight holds, and with apparent correctness, that the appellant cannot, in the same breath, consent to an increase of stock in acceptance of Blair & Company's offer and also demand that he (appellant) be allowed to cut down the allotment to Blair & Company, thereby reaping the benefit of an advance admittedly due to the knowledge of the public that Blair & Company were to acquire the stock and interest their strong financial backing in appellant's corporation.

The case decides that the offer by Stokes of the par value was sufficient to bind the corporation to deliver to him the shares—not, however, at par—but at \$450 each, and that no new offer at the increased price was necessary.

It is rather difficult to see just how this conclusion was arrived at, except on the principle that the company was absolutely bound to sell appellant the new shares, and this brings us back to the original question of the corporation's right to jump the price from \$100 to \$450 to appellant, an original stockholder. Of course, to hold that it was a price fixed independently by the directors is to lose sight of the fact that it was arbitrarily reckoned in response to the offer of Blair & Company. The case of *Gray v. Portland Bank*, 3 Mass. 364, holds, that on a refusal of a corporation to sell to a stockholder (original) his proportionate amount of the increase of stock, the measure of damages is the excess of the market value above par. This case is generally cited as authority and also seems to hold that the stockholder's right to subscribe for the increase at par is absolute. No American case, decided on common law principles, squarely overrules this holding, but it is a well-known fact that, at the present day, in some jurisdictions by statute and in others in deference to public opinion, an advance is usually charged to original stockholders on an increase of such stock. This applies particularly to public service companies, on the principle that the profits should accrue to the corporation itself, thus affording opportunity for improvements to the plant and equipment and a betterment of the service to the public, rather than be withdrawn from the corporation directly to the shareholder's private profit. As a matter of law, however, the decision of this case seems to be an attempt to set up a new rule based on the *bona fides* of the participants and the apparent equity of the individual case. The Trial Court, Appellate Divis-

ion and Court of Appeals all differed in their judgments and in the conclusions of law leading thereto. Evidently, action by the legislature is necessary to determine just what the law is on this point in New York state.

RIGHT OF EMPLOYER TO MAKE EMPLOYMENT CONDITIONAL UPON  
EMPLOYEE NOT JOINING LABOR ORGANIZATION.

During the last decade there has been much legislation affecting liberty of contract, such as statutes limiting hours of labor, prescribing conditions of employment, etc. The decisions of the courts as to the constitutionality of legislation of this nature seem to present much confusion and conflict of authority.

In the case of *People v. Marcus* (N. Y.), 77 N. E. 1073, a provision of the New York Penal Code making it a misdemeanor for an employer to coerce or compel employees to enter into an agreement not to join a labor organization as a condition to securing or retaining employment, was declared unconstitutional by the New York Court of Appeals, as contrary to the constitutional provisions against depriving a person of rights and privileges, except "by the law of the land," or of "life, liberty or property without due process of law." This decision, in favor of the employer's freedom of contract, is treated as substantially settled by previous holdings that such contracts are not against public policy, citing *National Protective Asso. v. Cumming*, 170 N. Y. 315; and *Jacobs v. Cohen*, 183 N. Y. 207; and the court declares briefly, that restraints on personal liberty are limited to those which affect "the safety, health, and moral or general welfare of the public."

Similar statutes have been declared unconstitutional in other states on the same ground, and also because violative of the constitutional provision against class legislation; 29 L. R. A. (Mo.) 257; 52 L. R. A. (Ill.) 283; 58 L. R. A. (Wis.) 748; 66 L. R. A. (Kas.) 185; but in all the cases, including the New York case, the courts do not discuss at any length the question whether the restraint does affect the "moral and general welfare of the public," merely deciding in effect that it does not.

The power of the legislature to determine questions of public policy is perhaps universally admitted by the courts; and the difficulty of ascertaining whether or not there has been a valid exercise of the police power arises only when such exercise contravenes some constitutional provision. A review of the authorities on this point, and as to the exclusive power of the legislature to determine questions of public policy, seems to establish the following propositions:

The propriety of the exercise of the police power, *within constitutional limits*, is purely a matter of legislative discretion, with which the courts cannot interfere. *People v. King*, 110 N. Y. 418. But when such statute exceeds constitutional limits, then it is for the courts to decide whether it has such a reasonable connection with the public welfare as to appear upon inspection to be adapted to that end, for it cannot invade the rights of persons and property under

the guise of the police regulation, when it is not such in fact. *Viemeister v. White*, 179 N. Y. 235.

Legislative powers, the exercise of which can only be justified on the ground of the police power, and are otherwise unconstitutional, can be such only as are absolutely required for the safety, comfort or necessities of the public, and which the framers of the Constitution, as men of ordinary prudence, cannot be supposed to have intended to prohibit, despite the language of the prohibition. *People v. Jackson, etc.*, 9 Mich. 285. But it is the province of the court finally to determine, in case of conflict of the police power and the Constitution, whether there has been a valid exercise of the police power, and whether the power of the state to legislate, or the right of the individual to freedom of contract, shall prevail.

Were this right of review by the courts to be denied, where constitutional guaranties are involved; should the legislature be the sole judge of what the public welfare meant, they could prescribe what the people should eat and drink, and what political, moral and religious creeds they should believe in, all for the public good. But this is not the case, for over the people of the state hangs the shield of written constitutions, which are the supreme law, which our legislators are sworn to support, which grant a restricted legislative power, within which the legislators must limit their action for the public welfare, and whose barriers they cannot overleap under any pretext of supposed safety of the people; for along with our written constitutions we have a judiciary, created by them a co-ordinate department of the government, whose duty it is, as the appropriate means of securing to the people safety from legislative oppression, to annul all legislative action without the pale of those instruments. This duty of the judicial department, in this country, was demonstrated by Chief Justice Marshall, in *Marbury v. Madison*, 1 Cranch 137, and has since been recognized as settled American law. *Beebe v. The State*, 6 Ind. 507-508. In case of conflict, the temporary will of the people contained in the law, must yield to the paramount will of the people contained in the Constitution. *Beebe v. State*, 6 Ind. 527.

#### STEAMSHIP TICKETS—CONDITIONS LIMITING LIABILITY.

There has been considerable conflict in the New York courts upon the question of carriers limiting their liability. Cases may be cited favoring nearly every possible attitude toward this subject.

The case of *Tewes v. North German Lloyd Steamship Co.*, reported in 73 N. E. 864, is of interest as tending to fix the New York rule. Here there was loss of baggage through negligence of carrier, a steamship company. The ticket of passage contained conditions limiting the company's liability for the loss or injury to or delay in delivery of baggage to an amount not exceeding \$50. Nothing was said in reference to negligence of the carrier. The passenger did not notice the conditions or have his attention especially called to them. The court held, that a ticket for an ocean voyage is a contract, that the fact that the conditions on the ticket were

not brought especially to the notice of the passenger would not relieve him from the enforcement of those conditions by the company. This view was based on *Steers v. Liverpool N. Y. & P. S. S. Co.*, 57 N. Y. I. and *Wheeler v. Oceanic Steam Nav. Co.*, 72 Hun. 5.

Johnson, C., in his opinion in the *Steers* case, says: "Looking to the course of business the court may take notice that engagement for voyage across the ocean is a matter of more deliberation and attention than buying a railroad ticket or taking an express company's receipt for baggage or for freight." This attitude seems to be strongly fixed in New York by being practically reiterated in *Wheeler v. Oceanic Steam Nav. Co.* and now in *Tewes v. North German Lloyd S.S. Co.* The same spirit is evident in the other question in the *Tewes* case, where the divided court held that conditions in a ticket (granting notice to passengers) were sufficient to limit carrier's liability to the amount specified even though loss of baggage occurred through ordinary negligence on part of carrier. Cullen, C. J., and Haight, J., dissenting. The amount to which liability is limited is construed as an agreed valuation and thereby the passenger is estopped from recovering full value in case of loss. Not that the company is relieved from liability for its negligence, but that the passenger has, by his acceptance of the ticket, limited his right to recover. *Magnin v. Dinsmore*, 75 N. Y. 410. In the present case Justice Haight dissented, maintaining that such ticket stipulations only operated to relieve the carrier from its strict common law liability and not from its obligation to exercise proper care as a bailee. *Rathburne v. N. Y. N. H. & R. Co.*, 140 N. Y. 48. The gist of the dissent is well expressed in the words of Gray, J.: "The rule is firmly established in this state that a common carrier may contract for immunity from its negligence or that of its agents, but that to accomplish that object the contract must not be left to presumption from its language. Considerations based upon public policy and the nature of the carrier's undertaking influence the application of the rule and forbid its operation except where the carrier's immunity from the consequences of negligence is read in the agreement *ipsissimis verbis*." *Kenny v. N. Y. C. & H. R. Co.*, 125 N. Y. 422.

The Federal courts and most state courts generally favor protecting the passenger, who is always more or less at the mercy of the carrier. *R. R. Co. v. Lockwood*, 17 Wall. 357. In two recent cases decided by Federal courts in New York it was held that a passenger cannot be held to conditions on a ticket of passage where his attention had not been called to such conditions and he had no knowledge of them. *The Minnetonka*, 146 Fed. 509; *Weinberger v. Compagnie Generale Atlantique*, 146 Fed. 516. The U. S. Supreme Court does not seem to draw the distinction between railroad and steamship tickets. Limited liability stipulations are treated as in the nature of subterfuges on the part of the carrier and are jealously scrutinized. Chief Justice Fuller says in *The Majestic*, 166 U. S. 375, "We quite agree with Lord O'Hagan in *Henderson v. Stevens* that when a company desires to impose special and most stringent terms upon its customers, in exoneration of its own liability there

is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted."

TRANSFER TAX; ASSESSMENT OF SHARES OF STOCK IN A CORPORATION  
ORGANIZED UNDER THE LAWS OF TWO STATES.

In appraising the value of shares of stock to ascertain the amount of tax to be imposed under the New York transfer tax law, an interesting question was presented to the Court of Appeals of that state in the case of *Charles P. Cooley, et al. as executors v. The Comptroller*, 78 N. E. 939. The law provides for a tax upon the transfer by will or intestate law of any property or interest therein over a certain value when the decedent is a non-resident of the state at the time of his death. In this case the decedent was a resident of Connecticut. He transferred by will shares of stock in the Boston and Albany Railroad Company, a consolidated corporation organized under the laws of both New York and Massachusetts. The question presented to the court was whether in making the assessment the state of New York should recognize the full value of the shares held by the decedent, or whether it should limit the tax to a portion of the total value upon the theory that the company holds its property in Massachusetts at least under its incorporation in that state.

It would seem by an examination of former decisions rendered by the New York courts that a conclusion could be reached without much difficulty. Though this precise question had not previously been presented, yet in the late case, *In re Palmer's Estate*, 76 N. E. 13, it was said by Judge Gray that a share of capital stock represents the distinct interest which its holder has in the corporation. That his right to participate in the distribution of the net earnings of the corporation as a going concern or in its assets upon dissolution, is proportionate to the number of shares which he holds; these evidence the extent of his proprietary interest and their assessment for taxation purposes must be upon that interest regarded as an entity and is unapportionable with reference to the *situs* of the corporate properties. Adding to this opinion of Judge Gray the fact that a consolidated corporation organized under two or more states, by seeking the aid of the laws of New York and being incorporated thereunder, is considered a domestic corporation therein (*Matter of Sage, et al.*, 70 N. Y. 220), it would seem that the same result must follow in the assessment of this present tax as where shares are held in a corporation incorporate alone under the laws of New York and holding property outside the state. *In re Bronson*, 150 N. Y. 1. The court, however, adopted a contrary doctrine which seems to be based upon the equitable view that otherwise stockholders would be subjected to hardship. It is pointed out that if New York levied a tax assessed upon the full value of the shares, the other states of incorporation might do the same, resulting in double taxation. Such taxation courts should avoid whenever it is possible within reason to do so and all presumptions are against its imposition. *Tennessee v. Whitworth*, 117 N. S. 129. "The law of



taxation is to be construed strictly against the state in favor of the taxpayer as represented by the executor of the estate. *Matter of Fayerweather*, 143 N. Y. 114."

This is undoubtedly true, but we respectfully submit that the learned court has seemed to lose sight of the particular law by virtue of which this assessment is made and the construction of which is called for by this decision. The history of legislation upon this subject in New York and elsewhere shows a desire to remedy the fact that as a general rule the great bulk of personal property escapes taxation during the life of the owner since, from its very nature it can be readily concealed. And it was in regard to a message to the legislature by the chief executive of that state calling for some additional tax law to remedy this evil that the first of a series of acts was passed of which the present is the culmination. (Opinion by Judge Vance in *Bronson's Case*, 150 N. Y. 1). Among other provisions the law now in force provides for the tax of the transfer by will of property within the state as above stated, the word property being afterward defined to include "all property or interest therein whether situated within or without this state." (Laws of 1898, Chapter 88, Section 242.) Thus plainly intending to make the tax as sweeping in its results as possible.

Since, therefore, the state has complete power to tax the transfer of stock as property at its true value when such shares are held in corporations organized under its laws regardless of where their property is situated (*Plummer v. Coler*, 178 U. S. 115), it would seem that such was the plain and undoubted intention of the legislature in the present instance. And this being the case, the presumption against the possibility of double taxation is rebutted. If such a construction will operate harshly upon certain individuals the remedy is not with the courts but rather with the legislature for a change in the enactment.

There is no case to our knowledge which has decided this identical question. The New York court considers *Moody v. Shaw*, 173 Mass. 375, and says that the opinion in that case does not seem to warrant a construction to the effect that such a transfer of shares as here under consideration would be taxed according to their full value. There the corporation involved was also the Boston and Albany Railroad. It is true that this precise point did not arise and the opinion is very short. But a careful consideration of that case leads one to draw the inference that in that state the transfer of such shares of stock for the purpose of taxation, would be assessed as shares in any domestic corporation regardless of the situation of the corporate property and incorporation elsewhere.

#### THE JURISDICTION OF THE FEDERAL COURTS IN CASES OF CONSPIRACY AGAINST PERSONS OF AFRICAN DESCENT.

On October 24, 1906, the Supreme Court of the United States, filed an opinion in the case of *Hodges v. United States*, 203 U. S. 1, which can hardly fail to be of universal interest especially in the southern sections of the country. In that case the court, in an

opinion remarkable for its brevity, held, Harlan and Day, JJ., *dissenting*, that the Federal Courts have no jurisdiction under the 13th Amendment or sections 1978, 1979, 5508, 5510, Revised Statutes, of a charge of conspiracy made and carried out in a state to prevent citizens of African decent, because of their race and color, from making or carrying out contracts and agreements to labor.

That the Federal Courts had jurisdiction of actions of this class previous to the three *post bellum* amendments to the Constitution, can hardly be contended. With the exception of a very few restrictions such as the prohibition against *ex post facto* laws, bills of attainder, etc., the entire control over the privileges and immunities of the citizens was vested exclusively in the state legislatures. *Carfield v. Coryell*, 4 Wash. Cir. Ct., 371, 381. The Federal Government is one of enumerated powers. *10th Amendment to the Constitution*. The 13th and 14th are universally conceded to be restraints on state action and are not intended to furnish redress for the invasion of individual rights. *United States v. Harris*, 1906 U. S. 313. The state alone has sovereignty and jurisdiction to protect personal liberty against lawless violence on the part of individuals. *Cooley's Const. Lim.* 706. Unless, therefore, the 13th Amendment gives the Federal Courts jurisdiction over crimes of the character charged in *Hodges v. The United States*, it would seem that, of necessity, the remedy must be sought through the state courts subject to supervision by writs of error in proper cases. The question then resolves itself into a determination of the scope of the 13th Amendment.

The national government has power, whether expressly given or not, to secure and protect rights conferred or guaranteed by the Constitution. *United States v. Reese*, 92 U. S. 214. Every right created by, arising under, or dependent upon, the Constitution of the United States may be protected and enforced by Congress in such manner as Congress may, is its discretion, deem best adapted to the objects sought. *Logan v. United States*, 144 U. S. 293. Can it be correctly said, however, that a conspiracy to prevent citizens of African decent, because of their race and color, from making or carrying out contracts and agreements to labor is the deprivation of a right created by, or dependent upon, the 13th Amendment? Or in other words does such a conspiracy in its effect virtually amount to slavery and involuntary servitude? The solution of this question appears to be the point of dissension among the judges in this case.

Pomeroy in his work on *Municipal Law*, 660 p. 383, defines slavery as a status implying perpetual servitude to the master or owner upon whom it confers the complete control and dominion over the labor, acquisitions and person of the slave. Whether this definition is sufficiently comprehensive or not, we do not attempt to say. At any rate, it is sufficient for our purpose. While the inciting cause of the 13th Amendment was the emancipation of the colored race, yet it was not an attempt to commit that race to the care of the nation. It reaches every race and equally

forbids Mexican peonage and the Chinese coolie trade when they amount to involuntary servitude. *Slaughterhouse Case*, 16 Wall. 36. It must be borne in mind, however, that Congress did not assume under the authority given by the 13th Amendment to adjust what may be called the social rights of men in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship and the enjoyment or deprivation of which constitute the essential distinction between freedom and slavery. *Civil Rights Cases*, 109 U. S. 22.

The rights of citizens to pursue and follow any of the ordinary vocations of life are not created by the Constitution, but are among the inherent and inalienable rights of men. *Butcher's Union v. Crescent City Co.*, 111 U. S. 757; *Civil Right Cases*, 109 U. S. 3, 13. In the case of *Logan v. United States*, 144 U. S. 203, 293 the court held that the right to work at a given occupation, or particular calling, free from injury or interference by individual citizens was not a right guaranteed by the Constitution. Where a state has been guilty of no violation of the 13th, 14th or 15th Amendments no power is conferred on Congress to punish private individuals who, acting without any authority from the state, and it may be defiance of law, invade the rights of the citizen protected by such amendments. *Le Grand v. United States*, 12 Fed. 577. Unless the state denies to persons of the colored race the equal protection of the laws, Congress has no power to pass laws for the punishment of ordinary crimes and offences against them. *United States v. Cruikshank et al.*, 1 Wood 308.

We fail to see therefore, how under circumstances such as these where the state has been guilty of no unjust discrimination against her colored citizens, but on the contrary is ready and willing to enforce the law and protect them in the exercise of their fundamental rights as citizens, the Federal Courts have any right to assume jurisdiction simply because the persons wronged happen to be of the African race. To hold otherwise would be in fact granting them privileges not secured to the white citizens who gave them their freedom and to invest the Federal Courts with jurisdiction over practically the whole category of crimes when the victim happened to be a negro. Such a result was clearly not intended by the adoption of the 13th Amendment of the Constitution.

## RECENT CASES.

**ANTI-TRUST STATUTE—CONSTRUCTION.**—*STATE v. M. K. & T. R. R. Co.*, 91 *SOUTHWESTERN* 214 (TEX.).—*Held*, that the anti-trust statutes of Texas, requiring every railroad to furnish reasonable and equal facilities for all corporations engaged in the express business, and defining a trust as a combination of capital, skill, or acts of two or more persons to create or carry out restrictions in the free pursuit of any business, should be construed as prohibiting a contract between a railroad company and an express company whereby the latter was given exclusive privileges, and the former bound itself not to contract with others to do an express contract on the road, and agreed that in case privileges should be accorded others by legislation or judicial proceedings the express company in question should have credit for the sums paid by other companies.

**BANKS AND BANKING—SAVINGS BANKS—ASSIGNMENT OF DEPOSIT.**—*AUGSBURY v. SHURTLIFF*, 99 N. Y. SUPP. 989.—*Held*, that a depositor in a savings bank may assign or transfer his interest in his deposit for a valuable consideration, without the delivery of the pass-book representing the deposit.

The relation between bank and depositor is simply that of debtor and creditor. *Marine Bank v. Fulton Bank*, 2 Wall. 252, 256, and the bank holds the fund subject to be paid out to the creditor according to the terms imposed by him. *Shipman v. Bank*, 126 N. Y. 318. Intention to assign need not be in express terms, but may be implied from any act or instrument which admits of such interpretation. *Garnsey v. Gardner*, 49 U. S. 167. The rule that a cause of action may be assigned by parol extends to a debt due to assignor from third person, as a deposit in a bank, *Phoenix Bank v. Risley*, 111 U. S. 125. A pass-book in itself constitutes no evidence of a right to draw money thereon. It merely imports a liability to depositor for moneys received. *Smith v. Brooklyn Bank*, 101 N. Y. 58. An order for whole sum due and given in good faith for a valid consideration, constitutes an assignment of deposit in hands of savings bank. *Kingman v. Perkins*, 105 Mass. 111. Although the precise point involved does not seem to have arisen, the principles involved are clear and seem to uphold the case.

**CARRIERS—TREATMENT OF PASSENGERS—MENTAL SUFFERING SUBJECT FOR DAMAGES.**—*GULF, C. & S. F. RY. CO. v. COOPWOOD*, 96 S. W. 102 (TEX.).—*Held*, that the trial judge did not err in charging that the physical and mental suffering resulting to the plaintiff from the negligent treatment of her daughter by the employees of the defendant constituted actual damages.

**COMMON CARRIER—CONTRACT LIMITING LIABILITY.**—*TWEWS v. NORTH GERMAN LLOYD STEAMSHIP COMPANY*, 78 N. E. 864 (N. Y.).—*Held*, that a ticket for an ocean voyage is a contract, and that the fact that the conditions on the ticket were not brought especially to the notice of the passenger would not relieve him from the enforcement of those conditions by the company. *SEE COMMENT.*

**CONSTITUTIONAL LAW—CONSPIRACY.**—*HODGES v. UNITED STATES*, 203 U. S. 1.—*Held*, that the Federal courts have no jurisdiction under Thirteenth

Amendment as sections 1978, 1979, 5508, 5510, Revised Statutes, of a charge of conspiracy made and carried out in a state to prevent citizens of African descent, because of their race and color, from making or carrying out contracts and agreements to labor. *SEE COMMENT.*

CONSTITUTIONAL LAW—DISCRIMINATION—PUBLIC CONVEYANCES.—*MORRISON V. STATE*, 95 S. W. (TENN.) 494.—*Held*, that a state statute which requires the separation of white and colored persons on street cars is a proper police regulation and not violative of constitutional provisions as abridging the privileges of citizens, or depriving them of equal protection of the law.

Equal accommodations are not denied when separate, but equally good cars are furnished for white and black persons, *Britton v. Atlantic R. R.*, 88 N. C. 536; for equality of accommodations, as required by the prohibition against discrimination, is not common and joint enjoyment of such accommodations, *Anderson v. Louisville & N. R. Co.*, 62 Fed. 46. By its police power a state may not regulate interstate commerce, *Leisy v. Hardin*, 135 N. S. 100; but it has been resorted to to remove such restrictions of carriers upon interstate traffic, *Hall v. DeCuir*, 95 U. S. 485. By its police power a state may determine the reasonableness of such regulations with reference to its established customs and traditions, and for the preservation of public peace and good order. *Plessy v. Ferguson*, 163 U. S. 537. Separate cars may be required just as ladies' cars and smoking cars, as conducive to the comfort of parties separately accommodated. *Freund on Police Power*, Section 699; which latter regulation may be imposed as restricting a nuisance. *Booth on Street Railways*, Section 238. *State of Louisiana v. Heidenbain*, 42 La. An. 483.

CONSTITUTIONAL LAW—LABOR LEGISLATION—VALIDITY.—*PEOPLE V. MARCUS*, 77 N. E. 1073 (N. Y.). A provision of the New York Penal Code, making it a misdemeanor for an employer to coerce or compel employees to enter into an agreement not to join a labor organization as a condition to securing or retaining employment *held* unconstitutional. *SEE COMMENT.*

CONTRACTS—PARTIES—RIGHTS OF THIRD PARTIES.—*VAN METER V. POOLE*, 95 S. W. (Mo.) 960.—*Held*, that a contract between two persons may be enforced by a third when entered into for his benefit.

Such a holding is an important exception to the rule,—recognized by all courts in its general application,—that a contract cannot confer rights on a person who is not a party to it. This exception is denied by the courts of England, Massachusetts, and some other states, either in law or equity, unless there is some declaration of trust. *Murray v. Flavell*, 25 Ch. Div. 89; *Exchange Bank v. Rice*, 107 Mass. 37. But is upheld in New York and most of the other states. *Lawrence v. Fox*, 20 N. Y. 268. Generally, all jurisdictions have repudiated the "blood relation" doctrine, fostered by Lord Mansfield. *Wilbur v. Wilbur*, 17 R. I. 295; *Marston v. Bigelow*, 150 Mass. 53. Even in those states where the third party beneficiary is allowed to sue, there must be something more than a mere promise for the benefit of the third person. The promise must be for his benefit, *Simson v. Brown*, 68 N. Y. 355. And, in addition, there must be between the promisee and the third person seeking to enforce the promise, the relation of debtor and creditor, or some such relation as makes the performance of the promise a satisfaction of some legal or equitable duty owing by the promisee to such third person.

*Lorillard v. Clyde*, 122 N. Y. 498. By statute, in many of the states,—no doubt in all of the code states,—it is expressly provided that, except in certain cases, every action must be prosecuted in the name of the real party in interest; under such a provision, it has been held that the person for whose benefit a contract is made may sue thereon. *Bliss Code Pl. 241*; *Pomeroy, Rem. & Rem. R.*, 139; *Pedueah Lumber Co. v. Water Supply Co.*, 89 Ky. 340.

CONTRACTS—STATUTE OF FRAUDS—WHEN SATISFIED. *ROBERTS v. TEMPLETON*, 3 L. R. A. (N. S.) 790, (OREGON). Where one in possession of a mining claim under a prospecting contract with one part owner purchased the share of the other owner, and merely continued his possession and operations without anything to connect him with the later contract, *held*, that this was not a sufficient taking of possession to satisfy the statute of frauds.

CORPORATIONS—STOCKHOLDERS—PARTIES TO ACTION.—*MCCREA v. McCLENAHAN ET AL.*, 99 N. Y. S. 689. The defendant, McClenahan, president of the corporation, received certain corporate funds for which he failed to account and which he appropriated to purposes for his sole benefit. This action was brought under Code Civ. Proc., Section 447, providing that any person having an adverse interest, or who may be a necessary party defendant to a complete settlement of the controversy, may be joined as defendant. *Held*, that one stockholder cannot join other stockholders as parties defendants with the defaulting president, even in case they refuse to join as parties plaintiff. O'Brien, P. J., and Clarke, J., *dissenting*.

A single stockholder cannot, without suing in behalf of all interested stockholders, maintain an action for misfeasance of officers. *McAfee v. Zettler*, 103 Ga. 579. The plaintiff must bring the suit on behalf of such stockholders as care to join him, *Cook's Stock and Stockholders and Corporation Law*, Section 737; but those refusing to join him must be made defendants. *Davis v. Peabody*, 170 Mass. 397. The purpose of the code provision being to avoid a multiplicity of suits by a complete determination of rights, *Turner v. Conant*, 18 Abb. N. C. (N. Y.) 160, it has been so interpreted that any person may be made a defendant who is a party necessary to a final settlement of the question involved. *Chapman v. Forbes*, 123 N. Y. 532. *Nirdlinger v. Bernheimer*, 133 N. Y. 45, 54.

CORPORATIONS—SUITS BY STOCKHOLDERS—WHEN DEMAND FOR CORPORATE ACTION IS UNNECESSARY.—*POLHEMUS v. POLHEMUS*, 100 N. Y. SUPP. 263.—*Held*, that a stockholder may bring a suit in his own name for misconduct of the directors, without first requesting the corporation to bring the action, where such guilty directors are in control of the corporation.

The general rule is that stockholders cannot sue to redress injuries to the corporation caused by the misconduct of strangers or directors. *Hawes v. Oakland*, 104 U. S. 450; *Alden v. Curtis*, 26 Conn. 456; *Button v. Hoffman*, 61 Wis. 20. A stockholder may sue in equity, however, if the directors of the corporation are guilty of fraud in the management of the affairs of the corporation, and the stockholders cannot obtain redress through the corporation. *Peabody v. Flint*, 6 Allen 52. But this right of the stockholders to sue depends, as a general rule, on their inability to obtain redress through the corporation and it must appear in the bill that the stockholders attempted to obtain redress by requesting the officers of the corporation to take action. Failure to show this request and refusal, makes the bill demurrable. *Mem-*

*phis & Charleston R. Co. v. Woods*, 88 Ala. 630. However, where the wrong was done by the directors in control of the corporation, such a demand and refusal need not be shown in the bill nor proved. *Brewer v. Boston Theater*, 104 Mass. 378; *Rogers v. R. R. Co.*, 91 Fed. 299.

**CRIMINAL LAW—ATTEMPT TO COMMIT SUICIDE—INDICTABLE OFFENSE.—**MAY V. PENNELL, 64 ATL. 885 (ME.).—*Held*, that in the absence of an express statute, an attempt to commit suicide is not an indictable offense.

This case comes nearer than any decision yet reported in this country directly deciding, on common law grounds, the interesting point involved. Aside from cases construing statutes, *Commonwealth v. Dennis*, 105 Mass. 162, is the only other American case which has dealt with an attempt to commit suicide. That decision, in holding such an attempt not a punishable offense, based its reasoning on the fact that in Massachusetts the whole subject of attempt had been regulated by statute and the common law impliedly repealed. While to some extent analogous to that case, the present decision goes further and virtually holds that, in the absence of a statute, an attempt to commit suicide is not punishable. This view is in conflict with what seems to be the English rule, for, while there have been no authoritative holdings, the two cases in which the question arose clearly enunciate the doctrine that a suicidal attempt is a misdemeanor. *Reg. v. Burgess*, 9 Cox C. C. 247; *Reg. v. Doody*, 6 Cox C. C. 463. So, also, the leading text writers have approved and adopted this view. *Clark's Criminal Law*, 196. *A priori*, it would seem, that, if suicide can be considered a crime, an attempt to commit that crime is punishable. At common law suicide was a crime. 4 Blackstone 190. And, although *Blackburn v. State*, 23 Ohio State 146, is authority to the contrary, recent decisions reiterate this view. *Commonwealth v. Hicks*, 118 Ky. 637; *State v. Levelle*, 34 S. C. 120.

**CRIMINAL LAW—MANSLAUGHTER—NEGLIGENCE.—**STATE V. MOORE, 106 NORTHWESTERN 16 (IA.).—*Held*, that a conviction for manslaughter should be sustained on facts showing a reckless and negligent indifference to the safety of others, and it is also held that it was unnecessary for the state in order to support a conviction to prove that the deceased person was not guilty of contributory negligence.

**CRIMINAL LAW—RIGHT OF MURDERER TO INHERIT FROM VICTIM.—**MCALLISTER V. FAIR, 84 PACIFIC 112 (KANSAS).—*Held*, that under a statute of Kansas, providing in clear terms that a husband shall inherit from his deceased wife, and making no exception to the rule, the court is not justified in reading into the statute a clause disinheriting a husband because he feloniously killed his intestate wife for the purpose of acquiring her property.

**DIVORCE—CONVICTION OF CRIME—EFFECT OF PARDON.—**HALLOWAY V. HALLOWAY, 55 S. E. 191 (KY.).—A statute provides that the conviction of a married person of an offense involving moral turpitude, followed by a sentence in the penitentiary for a term of two years or longer, gives to the other party to the marriage a right to a divorce. The defendant was convicted of such an offense, and, after serving five years in the penitentiary, was pardoned. After the pardon the other party to the marriage brought her bill for divorce. *Held*, that her right to a divorce was not affected by the pardon.

This case is a direct ruling on a hitherto undecided point. The weight of authority upholds the general rule that an absolute pardon relieves the

person to whom it is granted from all consequential disabilities of judgment and restores him to his prior rights. *Wood v. Fitzgerald*, 3 Or. 568; *State v. Foley*, 15 Nev. 64. The only exception to this is that a full pardon cannot restore to the recipient any rights or interests which have become vested in others in consequence of the judgment. *Ex parte Garland*, 71 U. S. 333. From this some text writers have reasoned to the conclusion set forth by this case. *Schouler's Husband and Wife*, 554.

**EASEMENTS—PARTY WALLS.**—*JACKSON v. BRUNS*, 106 NORTHWESTERN 1.—*Held*, that the owner of the second story of a building has no equitable right to compel the owner of the first story to keep the foundation and walls of the first story in repair for the purpose of furnishing continuing support to the second story in the absence of any express or implied contract on the part of the owner of the first story to do so.

**EVIDENCE—OPINION EVIDENCE—QUALIFICATION OF WITNESS.**—*MANHATTAN DELIVERY Co. v. SIMON*, 98 N. Y. SUPP. 844.—*Held*, it was error to permit a witness to testify as to the value of certain work done on garments, without having previously qualified himself as competent to so testify.

Although opinions of witnesses are to be excluded except upon questions of science and skill, as to which they have been specially educated, yet a witness may give estimates and opinions on questions of value. *Willis v. McCarn*, 33 Barber, 115. The general rule is to the contrary, however, and a witness must first qualify before he can testify as to opinion of value of certain articles. *Gregory v. Fichter*, 14 N. Y. Supp. 891. Where an article has no market value, its value may be shown by opinions of witnesses properly informed as to things of a similar nature. *Sullivan v. Lear*, 23 Fla. 463. Opinions respecting value of property are incompetent when witnesses fail to show a sufficient general knowledge of the subject-matter, *Haight v. Kimbark*, 51 Ia. 13. But the objection cannot be urged where an opportunity for cross-examination has been given. *Klots v. James*, 96 Ia. 1.

**EVIDENCE—REGULATIONS OF DEPARTMENTS OF GOVERNMENT—JUDICIAL NOTICE.**—*STATE v. SOUTHERN RY. Co.*, 54 S. E. 295 (N. C.).—*Held*, the courts will take judicial notice of the rules and regulations adopted by the United States Department of Agriculture, concerning cattle transportation, and applicable within the state.

Courts should take judicial notice of what ought to be generally known within the limits of their jurisdiction. *Gordon v. Tweedy*, 74 Ala. 238. In the early cases there was a tendency to refuse to take judicial notice of the regulations of the executive departments. So in 1857, the courts of California refused to take judicial notice of the rules of department of the Interior. *Hensley v. Turkey*, 7 Cal. 288. Similarly in regard to regulations of Treasury Department. *Moore v. Worthington*, 63 Ky. 307. Now it is generally recognized that the rules and regulations of one of the departments of government, established in accordance with statute, have the force of law, *Gratiot v. U. S.*, 4 How. 80; and courts take judicial notice of them. *Long v. Hanson*, 72 Me. 104. Hence, the courts of Montana will take judicial notice of the rules and regulations of the Department of the Interior. *U. S. v. Williams*, 6 Mont. 379. Federal courts take judicial notice of administrative regulations of considerable notoriety, including the rules of Federal executive departments. *Dominici v. U. S.*, 72 Fed. 46.



**INSURANCE—LIFE INSURANCE—WARRANTIES.**—**NATIONAL LIFE INS. CO. OF U. S. A. v. REPPOND**, 96 S. W. 778 (TEX.).—*Held*, that, where the statements in the application for a life policy are made warranties, it is essential to the validity of the policy that the statements be true without reference to the question of their materiality.

Warranties are in the nature of conditions precedent, so that the rights of the insured depend on his strict compliance with the warranties. *Fowler v. Ins. Co.*, 6 Cow. (N. Y.) 673; *Metropolitan Life Ins. Co. v. Rutherford*, 98 Va. 195. In the present case, the statements in the application were made warranties. Stipulations of this character are necessary to protect the insurer. *Vance on Insurance*, Section 104. Courts will presume conclusively that statements are material when they are made warranties by the parties, as in this case, and a breach of a warranty will be a good defense in an action on the policy. *Hutchinson v. Ins. Co.* 39 S. W. (Texas) 325; *Stensgaard v. St. Paul Real Estate Title Ins. Co.*, 50 Minn. 429; *Jeffries v. Ins. Co.*, 22 Wall. (U. S.) 47.

**MANDAMUS—RIGHT TO APPEAL.**—**HANSON v. POLICE JURY OF ST. MARY'S PARISH**, 41 So. (La.) 321.—*Held*, that mandamus generally will not lie if there is a right of appeal.

The functions of this prerogative writ are the enforcement of duties to the public by officers, and others who neglect or refuse to perform them and for which there is no other specific legal remedy, *Legg v. City of Annapolis*, 42 Md. 203, and mandamus cannot be used to perform the office of an appeal or a writ of error, *Ex parte Schwab*, 98 U. S. 240. This general rule is too far-sweeping and invites the criticism of a rigidity approaching harshness, for this writ will be granted when the remedy by action is doubtful. *Clark v. Miller*, 47 Barber, 38; or even if there is an equitable remedy existing. *Commonwealth v. Allegheny County Com'rs*, 32 Pa. 218. The same exception is taken when a writ of error is inadequate by reason of expense and delay involved, *North Alabama Development Co. v. Orman*, 71 Fed. 764; or when there is a remedy by appeal, if the action is clearly inadequate, *City of Huron v. Campbell*, 3 S. D. 309; or when an appeal is proper, but there is no one to prosecute it, as, after a claim has been filed by an administrator against the estate of another decedent, if such administrator die and a motion to revive the action in the name of his successor is denied, the only remedy is by mandamus, *Reynolds v. Crook*, 95 Ala. 570.

**MASTER AND SERVANT—SAFE PLACE TO WORK.**—**WALKER v. GLEASON**, 96 N. Y. SUPP. 843 (N. Y.).—Landlord contracted with a tenant to keep the hall lamps in the building in order, and subsequently, while the tenant was working with the lamps in one of her own rooms, the ceiling fell and injured her. Thereupon the landlord was sued for the personal injuries, the tenant contending that the relation of master and servant existed.—*Held*, that under these circumstances the landlord was not liable on the ground that, as an employer, he had failed to furnish a safe place to work.

**NUISANCE—RIGHT TO RECOVER DAMAGES.**—**MILLER v. EDISON ELECTRIC ILLUM. CO.**, 3 L. R. A. (N. S.) 1060 (N. Y.).—*Held*, that a lessor cannot recover damages for injury to the enjoyment and occupation of premises while they are in possession of a tenant, by the maintenance of a nuisance not of a permanent character on adjoining premises, although during such

continuance the lease had terminated and been renewed at a reduced rental because of the nuisance.

**PARTNERSHIP—TRADE-MARKS AND TRADE NAMES—RIGHTS OF RETIRING PARTNER.**—*WHITE v. TROWERIDGE*, 64 ATL 862 (PA.).—A retiring partner disposed of all his rights and property in the firm, but entered into no contract restricting him from prosecuting a similar competing business. *Held*, that he is not deprived of the right to use his own name in connection with such competing business, from the fact that his surname is a portion of the trade-mark used by the firm of which he was formerly a member.

A person has the right to the honest use of his own name, even to the infringement of a trade-mark. *Derringer v. Plate*, 29 Cal. 293; *Schier v. Johnson*, 111 Mass. 238. However, an assignment by a retiring partner of all his stock, property and effects carries the right to use his personal name when it has become a trade name. *Hoxie v. Chaney*, 143 Mass. 592. And it follows that the firm is entitled to protection in the use of such name. *Myers v. Buggy Co.*, 54 Mich. 215. In some cases this doctrine has been extended and *Le Page v. Russia Cement Co.*, 51 Fed. 941, holds that, when an individual's name has become a trade name belonging to another person, the right to use his name in connection with an article, even to state that it is manufactured by him, must be denied to a person who has previously disposed of his interest in the business. The better rule, however, would seem to be that, when a person has in any way acquired a right to a trade name, another person is only precluded from using his own name in such a way as to confuse his business with that of the original firm. *Walter Baker & Co. v. Baker*, 87 Fed. 209; *Gage v. Pub. Co.*, 10 Ont. App. 402.

**RAILROADS—NEGLIGENT OPERATION—NUISANCE.**—*COLGATE v. N. Y. CENT. RY. CO.*, 100 N. Y. SUPP. 650.—*Held*, where a railroad company so negligently operated its road as to permit unnecessary whistling and bell ringing in the residential section of a town, such acts constituted a private nuisance to an abutting land owner.

An action will not lie for mere consequential injuries caused by the proper and careful operation of a railroad. *Beseman v. Penn. Ry. Co.*, 50 N. J. Law 235; *Struthers v. Dunkirk W. & P. Ry. Co.*, 87 Pa. 282. But whistling and bell ringing as allowed by the legislature, are not signals for the convenience of its employees, and if used as such and thereby the public is unnecessarily disturbed, they constitute a legal nuisance. *Presbrey v. Railway Co.*, 103 Mass. 1; *Williams v. N. Y. Cent. Ry. Co.*, 16 N. Y. 97. What may be unobjectionable in a legal sense, in one locality may be a legal nuisance in another. *First Baptist Church v. Utica & S. R. Co.*, 6 Barb. 373; *Rodenbransen v. Craven*, 141 Pa. 546. The weight of authority in the United States is that, to constitute a nuisance, the acts must be such as to materially interfere with the comfort of an ordinary, reasonable person in the vicinity, *Sparhawk v. Railway Co.*, 54 Pa. 401; *Westcott v. Middleton*, 43 N. J. Eq. 478; and not merely to incommode a sick person. *Rogers v. Elliott*, 146 Mass. 349; *Fay v. Whitman*, 100 Mass. 76. And it is no defense that all the other persons in that locality are injured in the same way. *Wesson v. Washburn Iron Co.*, 13 Allen, 95.

**RELIGIOUS SOCIETIES—TITLE TO PROPERTY—MATERIALITY.**—*LEE v. METHODIST EPISCOPAL CHURCH IN V. S.*, 78 N. E. 646 (MASS.).—A grantor con-

veyed land to grantees by a deed in consideration of money paid by them as trustees of an unincorporated church the words being "trustees, their heirs and assigns." *Held*, in a suit by new trustees against persons acting as new trustees, involving the right to the property that the intention of the grantor to vest the property in the grantees as trustees was immaterial; for, if the deed was to the grantees as trustees, the title to the property did not vest in others by force of their appointment as trustees.

The general rule is that a trustee cannot delegate his authority. *Bispham on Eq.*, p. 219. The election of new trustees by an incorporated society in conformity with the usages of their church, created no privity of estate between them and the trustees who took the land by the deed, and could have no effect in law to divest of the title, those grantees named in the deed or the survivor of them. *Peabody v. Eastern Methodist Society in Lynn*, 87 Mass. 540. But a conveyance to trustees for the use of a religious society without naming any of them vests the title in the corporation named in the deed. *Keith & P. Coal Co. v. Bingham*, 97 Mo. 196. It is even held that a conveyance to trustees for the use of a religious society, whether trustees are or are not named, executes a legal estate in the congregation itself not by way of charitable use, but in absolute ownership. *Brendle v. German Ref. Cong. of Jackson Township*, 33 Pa. 415.

**RESULTING TRUST—PAYMENT OF PURCHASE MONEY—STATUTES.—***FAGAN v. McDONNELL*, 100 N. Y. SUPP. 641. Where a purchaser paid the consideration for a conveyance and took title in the name of his niece, without her knowledge, and she subsequently, having learned of it, executed a deed, blank as to grantees, and gave it to the purchaser. *Held*, that although he and his devisees held the property for eighteen years and the niece never claimed the rents nor looked after it in any way, an action in ejectment would lie. *Jenks, J., dissenting.*

In the absence of statute it is a general rule in England and in the United States that where a purchaser pays the purchase money, but takes the title in the name of another, a trust will result, by presumption of law, in his favor. *Perry on Trusts*, Section 126; *Dyer v. Dyer*, 2 Cox. 92. A few states, however, including New York, declare by statute that no such trust will result unless the grantee takes as an absolute conveyance in his own name, and without the consent of the purchaser. *Real Prop. Laws of N. Y.* (1896) Section 74. Such statutes are analogous to the common law rule, that where there is a feoffment to another without a consideration, if the use was actually declared it would prevail. 1 *Sander's Uses and Trusts*, 59; *Sugden's Gilbert Uses*, 89. These statutes, however, make an exception when there is a fraud, and a trust may be insisted upon. *Kennedy v. McCloskey*, 170 Pa. 354. *Rouchefoucauld v. Boustead*, 1 Ch. 206. Hence, in this case, a defrauded creditor would be allowed to enforce a resulting trust, so far as may be necessary for the satisfaction of his claim. *McCartney v. Bostwick*, 32 N. Y. 53; 1 *Stimson's Am. St. Law*, Section 1706. Or if the grantor did not consent to it, *Haack v. Weicker*, 118 N. Y. 67; *Lloyd v. Woods*, 176 Pa. 63. However, a resulting trust will not arise against the positive provision of a statute, nor in contravention of public policy. *Bispham on Equity*, (7th ed.) Section 82; *Hill on Trustees*, p. 93, 94. And parol evidence is admissible both to create and rebut such resulting trusts. *Swinburne v. Swinburne*, 28 N. Y. 568; *Blodgett v. Hildreth*, 103 Mass. 487.

**TAXATION—TRANSFER TAX—CORPORATE STOCK.—IN RE COOLEY'S ESTATE,** 78 N. E. (N. Y.) 939. A Massachusetts and a New York corporation combined and incorporated under the laws of both states with a single issue of stock, one-sixth of the property being in New York. *Held*, that the tax imposed by the New York statute upon the transfer by will of such stock as personal property of a non-resident decedent is to be assessed upon the basis of the location of the property. *Werner & Chase, JJ., dissenting.*

The transfer tax is not a property tax, *In re Wolfe's Estate*, Section 9 App. Div. (N. Y.) 349; it is an excise or duty on the privilege of succession, *Cooley on Constitutional Limitations*, page 708; *State of Missouri ex rel. Garth v. Switsler*, 40 L. R. 9 (Mo.) 280. As such privilege, it is the creation of the civil or municipal law, *Strode v. Com.*, 52 Pa. 181; and, as applied in the main case, is denied at common law, *Union Bank v. State*, 9 Yerg. (Tenn.) 490. The incorporating state may then give shares of stock a special situs for taxation purposes. *Cooley on Taxation* (2nd ed.), p. 23; *Tappan v. Merchant's Nat. Bank*, 19 Wall. (U. S.) 490; though by the general rule personalty follows the domicile of the owner. *Thompson v. Advocate Gen.* 12 Clark & F. 1; *Story on Convict of Laws*, Section 481, *et seq.*; *In re Romaine's Estate*, 127 N. Y. 80. As in the main case, the amount of the tax may be fixed by referring to the value of the property passing, *Plummer v. Coler*, 178 U. S. 115; but a tax upon the entire amount could not be objected to on constitutional grounds, *Blackstone v. Miller*, 188 U. S. 189. That such a tax should be reasonable is enforced on the grounds of natural justice and the spirit of the Constitution. *Tyson v. State*, 28 Md. 577; *Minot v. Winthrop*, 162 Mass. 113. This seems to be the real reason for the equitable doctrine of the main case in avoiding double taxation. *SEE COMMENT, supra.*

**TELEGRAPH COMPANIES—DELAY IN TRANSMITTING MESSAGES—DAMAGES.** **LUCAS V. WESTERN UNION TELEGRAPH COMPANY**, 109 N. W. 191 (Ia.).—*Held*, that if because of unreasonable delay in the acceptance, a contract was not completed, then it was for the jury to say whether the defendant was negligent in transmitting the message, and owing to this the plaintiff lost the benefit of entering into the contract. *SEE COMMENT.*

**TORTS—ELECTRICITY—DUTY OF ELECTRIC LIGHT COMPANY**, 100 N. Y. SUPP. 539.—*Held*, that an electric light company owed to a licensee or trespasser on its poles no duty to keep its wires properly insulated and one standing in either relation to it must be held to the exercise of reasonable care.

Care in the case of persons using a highly destructive agency means more than mere mechanical skill; it includes circumspection and foresight with regard to reasonably probable contingencies. *Anderson v. Jersey City Electric Light Co.*, 43 Atl. 654 (N. J.). However, those who employ in the prosecution of their business a highly dangerous agency such as electricity are bound to exercise such precaution to prevent injury to others as emergency would reasonably seem to require. *Atlanta Consol. Street R. Co. v. Owings*, 97 Ga. 663; *Joyce on Electric Law*, par. 664. *In Newark Electric Light & Power Co. v. Gordon*, 39 U. S. App. 416, a distinction is made between a trespasser and a licensee, holding that an electric light company is not bound to keep the insulation of his wires upon a pole in good condition as against a mere trespasser who intrudes upon such pole, but in maintaining wires upon same pole with other companies is bound to use due care in insu-

lating such wires. One doctrine goes so far as to hold that the only way to prevent accident where deadly electricity is used is to have perfect protection at those points where people are liable to come into contact with it, on the ground that as electricity cannot be seen and is silent and deadly, those who manufacture and use it for private advantage must do so at their own peril. *Overall v. Louisville Electric Light Co.*, 47 S. W. 442 (Ky.).

**TORTS—RAILROADS—INJURIES TO LICENSEE—***HAYMAN v. PHILADELPHIA & R. RY. CO.*, 63 ATL 967 (PA.).—Plaintiff, an employee of a locomotive works, was engaged in loading an engine on defendant's cars. While walking on the track back to the works, he was struck by the engine. *Held*, that this is within act of 1868 (P. L. 58), Section 1, providing that when any person shall sustain personal injury or loss of life while lawfully engaged or employed about the premises of a railroad company, of which he is not an employee, the right of action shall be the same as if such person were an employee, but this section shall not apply to passengers. The place of plaintiff's injury was in the premises of the defendant and plaintiff must be considered a quasi employee at the time of the accident. *Mestrezat, Potter and Elkin, JJ., dissenting.*

Whether or not the object of the person injured was one in which the owner of the premises was interested, is of decisive importance in determining whether the party was a licensee merely or was invited. *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391. When persons engage in a business directly connected with a railroad, they are discharging the duties of employees and are to be regarded as such. *Richter v. Penn. Co.*, 104 Pa. 513. But a servant who leaves work assigned him in a place of safety and voluntarily places himself in a dangerous position, where he is hurt, has no right of action against his employer. *Knox v. Pioneer Coal Co.*, 90 Tenn. 546. A servant may be in the service of two masters, who, as regards his service and employment, will be regarded as partners. *Swainson v. Northeastern R. Co.*, 3 Exch. Div. 341. There are *dicta* implying the contrary to the effect that persons upon railroad tracks, even by express invitation, may reasonably be expected to avoid danger from trains. *Schreiner v. Great Northern Railway Co.*, 58 L. R. R. 77 (Minn.).

**TRADE-MARKS—TRADE NAMES—RIGHT TO INJUNCTION.—***WARREN BROTHERS v. BARBER ASPHALT PAVING CO.*, 108 NORTHWESTERN 652 (MICH.).—*Held*, that where a city calls for proposals for the construction of "Bitulithic" pavement, and requires the pavement to be made according to certain specifications, a company might be awarded the contract for the work, although another company has habitually used the word "bitulithic" as a name for the particular pavement made by them, and had had this trade name registered and also filed for record as a trade name in the office of the secretary of the state of Michigan. The court says that the injunction must be denied because a trade name does not give one the exclusive right to make or sell a given kind of goods, the trade name being simply to point out the origin or ownership of the article to which it is affixed for the protection of the consumer, and that in cases where the rights to the use of a trade name are invaded the wrong consists in the sale of goods of one manufacturer under the false representation that they are the goods of another.

## SCHOOL AND ALUMNI NOTES.

The Corporation of Yale University at a meeting held on June 25th, 1906, adopted the following provision relating to the admission of students to the Yale Law School, and made the same applicable at the beginning of the academic year 1909-1910:—

Candidates for admission to the Yale Law School must present either a diploma from some approved College or Scientific School, or evidence that they have performed with credit the equivalent of at least two full years of work, of collegiate grade, of fifteen hours per week.

Such evidence can be furnished by a certificate from an institution in good standing. Candidates who have not attended institutions able to give this certificate, but who have otherwise fitted themselves for the study of the law by work or corresponding grade, are admitted to examination on payment of a fee of ten dollars. The examination will include: 1. Questions on the college entrance requirements included in the following schedule, (the schedule is omitted from this Journal. It can be found in the Catalogue of the Law School for 1905-06 on pp. 11-13), or their equivalent, unless the candidate can present evidence that he has already passed such a test; 2. Questions which will call for attainments such as might be fairly expected to result from not less than two full years of class-room work covering fifteen hours per week, under competent instructors on subjects selected from the following list:

History, Ancient, Mediæval, or Modern; studied in a way to involve knowledge of constitutional principles and social movements.

Advanced studies in some language or languages, ancient or modern.

Rhetoric, Literary Criticism, or History of Literature.

Logic, Psychology, Ethics, or History of Philosophy.

Advanced Mathematics.

Physics, Chemistry, or Natural Science; studied in such manner as to be theoretical as well as descriptive.

Physiography, Commercial Geography, or Political Economy.

The candidate must offer subjects from at least three of these groups. With this restriction, the selection of subjects may be made by each applicant at his option, provided written notice of

his selection is given by him to the Secretary of the Faculty of the Law Department three weeks before the opening day of the examinations.

It is important for law students as a class to have the maturity, culture, and ethical ideals for which an American college education stands. All those who are able to complete a college course before entering the Yale Law School are advised to do so; and if a college makes provision for the effective teaching of subjects contained in the Yale Law School course itself, credit will be given to students who come here for work which they have previously done in those subjects. The Faculty does not require a college degree, because such a requirement, in view of the difference of standing and merit of different colleges in the United States, becomes to some extent an arbitrary one, and is also one which may bear unfairly upon men who possess much ability but little time or money, who can reach the same grade of preparation by a different road.

Townsend Prize Orations must be handed to the Secretary of the Law School on or before April 1, 1907. For the year 1907 competitors may write on any one of the following subjects:

1. The Future of Cuba.
2. James Wilson.
3. Carl Schurz.
4. Character as a Factor in Business and in Politics.
5. The Relations of the United States to Latin America.
6. The Awakening of China.
7. The Election of United States Senators by Popular Vote.
8. The Increasing Importance of the Fourteenth Amendment.

The Law School Society of Corbey Court and Phi Delta Phi announces the election of the following men:

From 1908: Ralph Carroll Angell, Moores, N. Y.; Harrison Tweed Sheldon, New Haven, Conn.; Walter Preston Armstrong, Coffeeville, Miss.; Karl Goldsmith, Sac City, Ia.; Donald Judson Warner, Salisbury, Conn.

From 1909: William Cooke Beers, New Haven, Conn.; Joseph Leo Connor, Manchester, N. H.; Edmund Stanley Kochesperger, New Haven, Conn.; Frederick Holme Wiggins, Jr., Litchfield, Conn.

The Law School Society of Book and Gavel announces the election of the following men:

Aurelio Narganes, New York City; George Thacher Guernsey, Jr., Independence, Kan.; Richard Edgar Stillman, Pensacola, Fla.; George Foster Jones, Oroville, Cal.; George Basil Gordon, Glendora, Cal.; Clifton J. O'Harra, Carthage, Ill.; Harold Wood Thatcher, New Haven, Conn.; Robert Hunter McKay, Cleveland, Ohio; Ralph Turner Beers, Bridgeport, Conn.

John Carroll Slade, 1907, was a member of the University Team which met Harvard in the annual debate at Cambridge, Mass., Friday, December 7, 1906.

Owing to a slight attack of pneumonia Dean Rogers has been confined to his house and has been obliged to give up his classroom work during December. It is expected that Dr. Rogers will resume his duties after the Christmas recess.

'62.—Hon. Simeon E. Baldwin has been elected President of the American Historical Society

'75.—Mayor John P. Studley, Rep., was recently elected Judge of Probate of New Haven, Conn.

'76.—Hon. Victor H. Metcalf, Secretary of Commerce and Labor, was recently elected President of the Yale Alumni Association of Washington, D. C.

'83.—Hon. Carter H. Harrison will be at Pasadena, Cal., after December 1st.

'92.—Robert L. Platt has been elected President of Oregon State Bar Association.

'93.—Bamford A. Robb and Charles P. Harris have removed their law offices to Rooms 801 to 804 Lowman Building, First Avenue and Cherry Street, Seattle, Wash.

'94.—P. Waldo Marvin has been elected Judge of Probate for the District of Hartford, Conn., which includes the towns of Hartford, Bloomfield, Glastonbury, Newington, Rocky Hill, West Hartford, Wethersfield and Windsor Locks. Mr. Marvin was elected as a Democrat, succeeding Judge H. P. Freeman, '62, who retired after serving many years.

'95.—Elmore S. Banks, Rep., has been elected to the Connecticut House of Representatives from Fairfield.

'96.—Charles B. Waller, Rep., will represent New London in the Connecticut House of Representatives.

'97.—Chester L. Dane has moved from Marblehead, Mass., to 322 Beacon Street, Boston, Mass.



'97.—Edwin W. Higgins, Rep., was re-elected to Congress, November 6 from the Third Connecticut District.

'97.—David L. Klinedinst has been elected on the Democratic ticket to represent the 28th Senatorial District in the Senate of Pennsylvania.

'90.—Thomas F. Noone, Dem., was elected November 6th as Representative from Vernon, Conn.

'00.—William J. Malone, Rep., has been elected to the Connecticut House from Bristol.

'01.—Carl F. Bollman has been appointed Assistant Clerk of the Probate Court for New Haven by Judge Studley.

'02.—Garfield R. Jones' address is erroneously given in the University list as San Diego, Cal. His correct address is 7 Monroe Street, Chicago, Ill., where he is engaged in the general practice of law.

'02.—John L. Gilson has been appointed Clerk of the Probate Court for New Haven by Judge-elect John P. Studley.

'03.—Martin J. Cunningham has been elected to the Connecticut House of Representatives on the Democratic ticket from Danbury.

'03.—L. K. Brewer was elected Judge of Probate for the District of East Hartford, Conn., on November 6th.

'05.—J. Robert Waller is taking post-graduate work at Oxford University. His address is 22 Worcester Place, Oxford, England.

'05, D. C. L.—Chung Hui Wang recently received the imperial degree of Doctor of Literature, standing second in list of those taking the government examination for this degree.

'06.—Herman Glasser is at present with N. Levin & Co., of New York City. His address is 797 East 138th Street, New York.

'06.—Fred R. Ryan's address is 154 West 15th St., New York City.

'06.—Joseph G. Anquillare is in the law offices of Pigott and Dewell, Law Chambers, New Haven, Conn.

'06.—John W. Joy is for the present engaged in the general practice of law in Hartford, Conn.

## REVIEWS.

*Foundations of Legal Liability.* By Thomas Atkins Street. Three Volumes, pages xxx, 500; xviii, 559; xi, 572. Edward Thompson Co., 1906.

In these days, out of the great mass of legal publications comparatively few emerge as real achievements in legal scholarship. The subject of this review is one of the few. Very evidently it is by an academic man and it appeals primarily to academic students of the law; but it appeals equally as much to the practitioner who desires to understand fundamental principles and to know other things than the mere tricks of the trade.

The three volumes deal respectively with Torts, Contracts and Common Law Actions. They purport to contain "a presentation of the theory and development of the common law." Throughout the author shows a knowledge of the best previous thought on the subject, a readiness to adopt and make use of it, and strength enough to depart from it on occasion and come to a different conclusion. It is impossible in a brief review to consider the accuracy of many of these conclusions, nor is it possible to criticise them intelligently without a careful study of the sources from which they are drawn.

The treatment of the subject of liability for torts in the first volume is not revolutionary, but is original and highly enlightening. The classification of torts is in some respects new and is of assistance in gaining an understanding of the reasons for liability. For instance, the author puts trespasses committed not by the defendant directly, but through agents, animate and inanimate, into one class, under the title "secondary trespass formation." This classification, besides grouping several allied subjects not heretofore logically classified, assists the author in working out his treatment of the subject of negligence. The exposition of the principles underlying liability for torts in the various subdivisions of the subject is uniformly good, particularly so in the cases of secondary trespass, defamation, malice and negligence. Perhaps the author is not wholly justified in his criticism of the doctrine that negligence consists in a breach of duty to take care. And perhaps he has not improved upon it as much as he thinks. Is it much of an improvement over "negligence is a breach of duty" to say "negligence is a sort of legal delinquency?" However, he is right in saying that the doctrine that the law imposes a duty to take care is no real explanation of the foundation of liability for negligence.

The subject of Contracts in volume two is not given as complete an exposition as is the subject of Torts; but the results obtained therein by the author are in part more startling and original. Volume two contains four parts and an appendix. The author treats first the history and general principles of con-

tract; second, the history and theory of the law of bailment; third, the history and principles of the law of bills and notes; and fourth, the law of representation or agency as affecting the relations of principal and agent and master and servant. The appendix contains the negotiable instrument's law with annotations. We may dismiss the second, third and fourth parts with the remark that they are adequate and accurate, but not new and unusual. The treatment of agency is much like that of Professor Hufcut. The historical treatment of bills and notes is deserving of especial commendation.

The first part alone of the second volume ought to be sufficient to establish the author's reputation as a brilliant thinker in contracts. After two chapters on the early history of contract, he plunges into an investigation of the doctrine of consideration, its foundation and its character, necessarily involving a discussion of the actions of debt and assumpsit. It is here that he departs most widely from prior accepted conclusions. Consideration in the sense of a detriment to the promise is required only in the case of unilateral contracts. Bilateral contracts acquire their binding character from *consent* alone, and not at all from consideration in the sense of detriment. He abandons the vain effort of determining how it is that a promise is binding because it is a detriment and is a detriment because it is binding. A third form in which consideration for a promise may appear is a pre-existing legal obligation or debt, the doctrine of consideration as a detriment to the promise being here again abandoned. No doubt these conclusions will find strong opposition on the part of those who have been at so much pains to establish the accepted theories of consideration.

The author's mastery of the distinctions between unilateral and bilateral contracts is very gratifying to the reader. His treatment of the foundation of liability on a bilateral contract is beyond question a brilliant achievement in constructive reasoning. He lays down the principle that the obligation of a bilateral contract is based upon consent alone, but he limits the number of enforceable bilateral contracts to those consisting of mutual promises to do acts which, considered wholly apart from the circumstances of the individual case, would be a detriment to the actor. This limitation necessarily destroys the simplicity of the author's construction, but is of course required by the long-established course of judicial decision. By means of this principle the author explains the seeming paradox that a promise to perform an act may be valid consideration for a promise when the actual performance itself would not be. He asserts that a unilateral promise is, for historical reasons, not enforceable unless the act or forbearance given in return amounts to a detriment, but that bilateral promises are binding purely on consensual grounds. However, even though we should agree with him that the basis of liability on bilateral contracts is consent and not consideration, still it seems doubtful whether we should not still further limit the number of enforceable bilateral contracts to those

consisting of mutual promises to act or to forbear, which act or forbearance *will amount to a detriment in the individual case*. This would bring the rule very close to that constructed by Professor Williston, though it would avoid the necessity of showing that the making of a promise is in itself a detriment. It would further be in harmony with those very numerous American decisions to the effect that bilateral promises are invalid where one of them is to do that which the promisor is already bound by contract to do. The author does not give an adequate review of these cases. Instead, he places conclusive weight upon such decisions as *Scotson v. Pegg*, 6 H. & N. 295, and *Abbott v. Doane*, 163 Mass. 433.

The author invents (Volume II, page 74) the term "incompetent consideration" for the doing of an act which the actor is under a legal obligation to do. His treatment of this is not altogether convincing. He adopts Sir F. Pollock's reasoning that the doing of such an act is no consideration because it is no detriment to the doer. Later, however (Volume II, page 99), in supporting the doctrine that part payment of a debt is not sufficient consideration for a promise to forego the residue, he cites Professor Ames to the effect that the doing of any act is such a detriment to the actor as will support a promise, and adds: "We admit that payment of part of a debt is an act and that such act furnishes a consideration for the promise to forego the residue. The point, however, is that the consideration is incompetent." This appears to say, part payment is incompetent consideration because it is no detriment, and it is no detriment because it is incompetent. The question turns on whether part payment is actually a detriment, and there is much to be said in favor of the position of Professor Ames.

The author's conception of legal duty as an adequate substitute for consideration in the sense of detriment causes him to classify many obligations as truly contractual even though they are not assumptual. It enables him to throw a clear light upon the situation existing with reference to promises for the benefit of a third person, the chapters on that subject being a distinct addition to its literature. It further requires him to re-classify the subject of quasi-contracts. Among the quasi-contracts he places "promises implied as of fact." It appears to the reviewer that the author's treatment of this term is not altogether clear. Actual, definite promises may be made by conduct as well as by words, in which case the obligation assumed is certainly not quasi-contractual. Yet such promises would seem to be "promises implied as of fact." Of course, the author is right in classifying as quasi-contractual those obligations created by law because justice demands it, even though an actual definite promise cannot be found in the conduct of the parties. But in these cases there is no "promise implied as of fact." Notwithstanding this possible obscurity, the author's basic idea is correct, and his conception of legal duty as contractual is second in importance only to his theory of bilateral contracts.

Of his work on the doctrines of accord and satisfaction the author, in his preface, says: "We have, it is thought, succeeded in giving a rational and consistent account of this subject from beginning to end." It is beyond doubt that in the main his work bears out his statement; but it appears to the reviewer that the author has failed to give due consideration to the distinction between an executory accord, looked upon as a contract in itself and as the basis of an action at law, and an executory accord looked upon as a satisfaction of the prior obligation and a bar to an action thereon by the creditor. It may well be that an action lies for failure to perform an executory accord, even though there remains a right of action on the original obligation. However, the author's account of the historical basis for the rule that an executory accord is no satisfaction is beyond criticism; and his description of the doctrine as one of "the two greatest mysteries of the common law," and as "a fossil that has come down to us from a previous legal formation" is very apt and interesting. In chapter xiii of volume two, the author sets forth in convincing fashion the doctrines of novation, establishing that "in its essence the novation is an executory accord, and the principle underlying it is at war with the hoary rule that the executory accord is invalid."

Volume three treats of the forms of action at common law. It is undoubtedly true that knowledge of these actions and of their history is necessary to an understanding of the substantive common law, and that in getting rid of these forms jurisprudence lost as well as gained. The author's discussion of the origin and scope of the various remedies at common law is entirely proper and satisfactory.

The entire work is written in a clear and entertaining style. The volumes are in dignified form, with good paper, good margins and legible, errorless type. The substance of each paragraph is indicated in notes printed on the margin. Volume three contains a table of some four thousand cited cases and a very full index. In his preface the author frankly exhibits a calm confidence that his work is original and well done. This confidence is justified.

A. L. C.

*Elementos de Derecho Internacional Privado.* Third edition. By Manuel Torres Campos. Madrid, 1906. Pages 549.

With what was contained in the first edition of this work, issued in 1893, has been incorporated much of what was in the subsequent treatise from the same pen, on the Foundations of Extraterritorial Legislation (*Bases de una Legislación de Extraterritorialidad*, Madrid, 1896). The present edition omits much of the bibliography of the earlier ones and adds many references to the publications of the last ten years, including the doings of the four Hague Conferences for the Promotion of International Private Law, of which the author was a distinguished member.

His discussion of the choice to be made between personal and territorial law as the criterion of individual rights and duties is

especially interesting to Americans. Europe, he says, naturally adopted the former in its reaction against feudalism (page 91). The United States as naturally rejected it, because it was a country of immigrants (page 90). Emigration on a great scale, a universal phenomenon belonging only to modern society, has brought a new factor into the law of the world—the mobilization of the human race (page 92). Wherever a country receives large accessions of this sort it inclines to the supremacy of its own law; if it has few, it contends for that of the law governing the person. Thus Italy, with less than 60,000 foreign residents, but which has sent forth two millions of her people to live elsewhere, stands strongly for the latter (page 93). The Argentine Republic, on the other hand, in which the population of the chief city—Buenos Ayres—is more than half foreign, follows the United States in insisting on the former (page 94). The maxim for both nations, he declares, is "No one is a foreigner in America" (page 97).

The work of several of the Spanish and Spanish-American Congresses of jurists and economists, held in Spain in the last few years, is described, and shows the strong attachment still subsisting between Spain and her former American possessions. Such a "social and economic congress," held at Madrid in 1906, under the auspices of the "Spanish-American Union," voted to recommend the ratification of all the treaties of Montevideo (of 1888-9) in regard to matters affecting private international law, both by Spain and by all the Spanish-American states which had not already signified their adhesion (page 141). The ties of language, religion and history are often stronger than any that wars of independence can make or break.

Professor Torres Campos is of the opinion that there should be no real difficulty in the establishment of a uniform law for the world as to bills of exchange, since no subject can be freer from national prejudices, or from all bonds imposed by moral, religious, or social ideas, while none of the differences relating them in the present laws of the nations depend on reasons that can be called fundamental (pages 385, 386).

Whatever point the author discusses, he illumines by his clarity both of thought and expression. It is to be regretted that, like so many works of European jurists, the volume is without an index.

S. E. B.

*The Elements of Jurisprudence.* By Thomas Erskine Holland. Tenth edition, Oxford, 1906.

Holland's *Jurisprudence*, first published in 1880, marked a new phase in English legal literature. The success with which Prof. Holland then analyzed the theory and subject matter of law is quite sufficiently attested by the fact that since the first edition appeared his book has had no serious competitor in the distinctive field of formal scientific statement of the principles underlying modern law, and the classification of rights recognized in modern legal systems. That a tenth edition of a legal treatise which does not appeal directly to practitioners, has been called for in twenty-

five years, is in countries where the common law prevails, somewhat remarkable. The book is so well known to those who make any use of that class of legal literature that any general analysis is not now required. The present edition is about one-fifth larger than the first edition and about one-tenth larger than the eighth; a very modest increase in size and quite largely accounted for by the enlargement of the citations in foot notes. Full use has been made of recent cases, the tenth edition containing a third more citations than the eighth edition published in 1896. The chapters upon "The Sources of Law," "Analysis of a Right," "Antecedent Rights 'In Rem,'" and "Antecedent Rights 'In Personam,'" are those in which the changes have been most material, whether the present edition is compared either with the eighth or first editions. These changes are not, however, so much changes in substance as more elaborate citations or expansions of originally brief discussions.

Since the first edition the chapter on Sources of Law has been somewhat enlarged. Religion has been added as a source, but the larger editions have been made in the discussion of adjudication and equity. In Chapter VIII, Analysis of a Right, the subject of "acts" was in the 1886 edition first worked out fully from the point of view of the will, consciousness and the manifestation of the will, and is a highly practical discussion. In Chapter XII, the subject of the agreement in contract was also expanded in 1886, and what was termed the "newer theory" of "the reasonable man" as the one to determine the construction to be put upon the acts of another with reference to his intent, was recognized as the luminous principle which "at once sweeps away the ingenious speculations of several generations of moralists," (p. 256-7). This is illustrative of the adoption of external standards for the determination of legal intent. This theory was elaborately worked out by Mr. Justice Holmes in his Common Law, published in 1881. In the chapter on Public Law there is a new subdivision "Civil Procedure by and against a State."

Upon the whole it is unusual that an institutional writer should, after twenty-five years development in law by formal codes, miscellaneous legislation, adjudication and exhaustive discussion of the history and theory of law in various fields by such writers as Dicey, Pollock, Maitland, and our own Holmes, find so little necessary to be done to retain for his book the first place in the literature of elementary jurisprudence. This fact is, in itself, the best answer to those who question whether legal systems are collectively capable of formal scientific treatment. Some of his classifications have been criticised, but the author admits that in certain respects this is matter of convenience and not of fundamental theory. To the writer the earlier part of the book in which the nature of law and of legal right are discussed with great clearness, has always seemed the most valuable.

The line of separation between conduct as regulated by law, and conduct as regulated by the rules of morality and religion, is drawn with a sure hand. The result is that the book is not spec-

ulative nor a priori in method. Those with a taste for the metaphysic of law, as to its origin, validity or purpose in the abstract sense will find little. It is an actual system that is scientifically treated, and not a theoretical, and this element of concreteness, of actuality, is doubtless the element that accounts for the favor with which the book has been received by English and American students.

But words of commendation are not needed for a book in its tenth edition. The lawyer with any scientific or philosophical tendency, who has not read and studied Holland, has missed a valuable aid to his general understanding of the subject of his profession.

E. B. G.

*A Treatise on the Law of Municipal Corporations.* By Howard S. Abbott. Sheep. Volume 3, Pages XIX, 3045. Keefe-Davidson Company, St. Paul, 1905.

This topic of the law has had such a variant growth, developing in different parts of the country to meet the conditions as they there arise and depending in many instances upon the legislative action of bodies made up of men of all degrees of legal learning, as well as all degrees of common sense, that it is difficult to classify the subdivisions of the subject in a manner the logic of which will appear to all. Judge Dillon, in his work on the subject, seems to have based much of his arrangement upon general historical development, the author here discussed appears to have made his arrangement, wherever possible, upon the basis of an imagined composite, or typical municipal corporation, taking it from its original inception up through its growth and future life. From a legal standpoint this is an improvement, as a lawyer's mind more readily follows the sequence of events in a properly conducted legal procedure, than it does the actual, though sometimes illogical, sequence of events in history.

This work is, in a great measure, to Municipal Corporations what Wigmore is to Evidence, Thompson to Negligence and Page to Contracts. It is not entirely analagous to any of these works, and could not be. The peculiar and unique condition of municipal corporation law prevents that. The work does not seem quite as exhaustive as either Wigmore or Thompson, but is more nearly like Page. It differs from Page in that it has in its notes more quotations from the important cases, thus putting the lawyer in possession of the basic law even in the absence of a good library of reports. The author realized that of those lawyers, the main part of whose practice is in municipal corporation law, the majority dwelt in the smaller towns and cities, where law libraries containing complete files of all the reports are not easily accessible, and by wisely following the example set by Judge Dillon of inserting many and lengthy case quotations, he has made his work especially valuable to this class of lawyers. It would be well for every such lawyer to have this work as well as that of Dillon, for though of necessity they do to a certain extent cover the same ground, they are by no means entirely co-exten-



sive; for where another author has given a good discussion of a sub-topic, the present author instead of giving a long discussion, merely cited, or possibly gave a short quotation from, the other work, and a very thorough knowledge of former books on the subject is shown.

The style of this book is not the same as that of Dillon's. Judge Dillon's work contains more meaning per word, but it requires earnest and closely applied study to extract the meaning, while in this work of Mr. Abbott's the sentences are not as a rule quite so meaty, but the principle expressed is generally more easily grasped at first reading. Judge Dillon seems to have put more of his heart into his work, also more of his personal opinions, while Mr. Abbott has to a great extent stated the law and not his personal opinions thereon. The place where his individual ideas most frequently creep in is in the hypothesis from which he deduces the reason for the law, as for example at page 685, "The less government they have, the more independent and prosperous they are, etc," is used in explaining the rule against Municipal Corporations engaging in private enterprises. In general, Mr. Abbott's style seems studied and academic, rather than spontaneous.

Many authors make the mistake of trying to harmonize decisions that are not at all in accord. It is, of course, nice to think of our chosen profession as the great, consistent and logical set of authoritative rules, which in theory it of course is. But practically it is far from that. In fact the harmonization of the rules is, and has been, the life-work of many thousands of judges, and they are far from perfecting their task. For a single author to attempt to work out a perfectly consistent set of rules and have them law is impossible. Mr. Abbott has been very successful in steering clear of this shoal-Charybdis, but in doing so has approached its Scylla, the leaving of apparent rather than real inconsistencies unexplained. For example, to the mind young and seeking in the law, it is somewhat disconcerting to read in one sentence that "the expense, etc. . . . must be paid wholly by the state," and then to follow on into the next sentence and discover that "by law, however, a certain portion of the expense may be chargeable against the county or district, etc." (p. 2461.)

The two hundred page index is very full and complete and almost large enough to require a sub-index. In the several points looked up through it, by way of experiment, it seemed to lead one by a path shorter than is usual to a discussion of the points sought. However, this matter of close relation between the index and point sought, is one that is difficult to judge by experiment; it takes the heat and zest of seeking law for an actual conflict to bring forcibly to one's attention the great virtue of an index, or its inadequacy, as the case may be.

On the whole, this work, although not the best of its kind, is one upon which an enormous amount of very well directed work has been spent, and the possession of it will save many a lawyer the necessity of doing that work, when he desires some part of it for a case.

S. W. B.

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## LEGAL ETHICS.\*

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*Mr. Chancellor, Mr. Dean and Members of the Graduating Class:*

I am well aware that what I have to say this evening cannot prove of general interest to the audience which is here assembled. But I am confident that the friends who grace this festival with their presence recognize the fact that this occasion belongs to the graduating class, and that any words spoken to-night should be addressed to them. If I can say anything which may be helpful to these gentlemen who now have completed the preparation which the Law School affords and are about to assume the heavy responsibility which active practice of the law imposes, I shall feel that this evening has been well spent though my words prove to be silver and not gold, and my speech be ungarlanded with even "the humble flowers of the mountains."

Gentlemen of the graduating class: I do not assume to speak to you as one clothed with authority, but as one who through experience and observation is entitled to speak as an elder to younger brethren.

You stand to-night on the threshold of the temple of the law and await the opening of the gates which shall admit you as of the priesthood of justice and give you membership in a profession which is one of the most ancient, the most enlightened, the most illustrious and the most honorable of all vocations. It is a profession which in this country has been adorned by many men of signal brilliancy and of imperishable fame. When one recalls John Marshall, Hamilton, Story, Kent, Taney, Pinkney, Wirt, Webster, and

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\*An address delivered before the graduating class of the Albany Law School, May 31, 1906.

Choate,—“The names that were not born to die,” intellectual monarchs, “a galaxy of the gods”—one may be pardoned for asserting that “the glory of our profession is the glory of our country.” To become a high-priest in the Temple of Justice is worthy of the highest ambition of the noblest men. To establish justice is the purpose of the profession. To serve the state in maintaining the rights of man to life, liberty, property and reputation is its mission. To aid the helpless and relieve the oppressed, to defend the innocent and punish the guilty, to resist even the government itself when it seeks to encroach upon the constitutional rights of the people—this is the lawyer’s work and the lawyer’s duty.

In a state with a backward civilization and an autocrat upon the throne there may be little need for members of our profession. When Peter the Great visited Westminster it is said he learned with wonder that some scores of oddly apparelled persons whom he had curiously asked about were lawyers. “What! all these lawyers?” was his exclamation. “I have but two in all my dominion,” he continued, “and I intend to hang one of them as soon as I get home.” The story reveals the difference in the civilization of the two countries. In the one there was a government of laws and not of men, and the lawyers were numerous and influential. In the other the government was the Czar and his will was law and there was no need of lawyers. And when Jack Cade’s insurrection was thought to have succeeded, Dick the Butcher said to Jack: “The first thing we do, let’s kill all the lawyers.” Thereupon Cade replied: “Nay, that I mean to do.” Under a government conducted by men of his ilk lawyers might easily be dispensed with. But under a government of laws and not of men lawyers are indispensable.

In one of the learned professions those who cherish intellectual integrity often find themselves, according to their own admissions, more or less embarrassed. Original thinking is, they claim, discouraged in their professional schools, the methods of which are too often narrowing and deadening to intellectual growth. Judged by their own statements we find, in a profession in which intellectual honesty should be exalted, that it is discouraged. In the legal profession intellectual honesty is never anathematized. Indeed no man can reach eminence in our profession unless he possesses intellectual honesty. Mr. Edward J. Phelps once said that the leading characteristic of every great lawyer or great judge that had ever lived was intellectual honesty. It is sometimes necessary in the law as in the ministry to excommunicate one who has shown himself unworthy of confidence. But when a lawyer is disbarred it is always because of

unethical conduct, and never because the profession wishes to fetter the freedom of his mind. In schools of law, however it may be in schools of theology, original thinking is encouraged. The student in the law schools is not compelled to accept dogmatic teaching on authority which is not to be disputed. He has the right to reason why. He is to test the judgment of courts by reading, comparison and discussion, that he may satisfy his own mind whether the conclusions reached are right or wrong. If tradition is on one side and truth on the other, it is always his privilege to show the mistake and reveal the truth. There is little embarrassment with us in adjusting old opinions to new knowledge, and we are not divided into orthodox and heterodox according as we accept the new learning or the old. There is no necessity with us that heresy-debaters should

"Prove their doctrine orthodox  
By Apostolic blows and knocks."

But whatever may be the embarrassments of this sort to which the theologian is subjected, the lawyer has difficulties enough of his own and of which the theologian is wholly ignorant.

"Much lighter task the minister's  
Than is the lawyer's, one infers;  
The simple fact is,  
As adage and experience teach,  
It is much easier to preach  
Than 'tis to practice."

The practice of the law has sometimes been represented as a tricky sort of business, and the advocate as a "shady" sort of individual. Charles Macklin characterized the law as "a sort of hocus-pocus science that smiles in your face while it picks yer pocket, and the glorious uncertainty of it is of mair use to the professors than the justice of it." And Dr. Johnson, when asked at a dinner party as to the identity of a guest who had just left the room, said: "Gentlemen, I do not like to speak ill of a man behind his back, but I believe he is a lawyer." And there is the story of one looking about in a country churchyard and coming upon a stone with the inscription: "A good lawyer and an honest man." "It is very strange," he said, "that where land is so cheap they should bury two men in one grave."

But all such characterizations of the profession are after all not meant to be taken seriously. The practical judgment of those who are competent to form an intelligent opinion is that the bar is not surpassed in honesty, candor and honor by any class of men of like numbers. No person can become a lawyer unless he can satisfy the

court not only that he has sufficient knowledge of the law to entitle him to enter upon the duties of an attorney, but that he has what is equally, if not more, important—a good moral character. As it is essential to his admission to the bar in the first place that the applicant be in truth and in fact a good, moral man, it is certainly equally essential that he maintains that character after he has been admitted. An attorney will be disbarred whenever it is demonstrated to the court that he is not an honest man, for the lawyer in becoming dishonest violates the essential condition upon which he was admitted to the bar, and forfeits all claim to recognition either by his professional brethren or by the courts.

The philosophers tell us that jurisprudence has its base in ethics. A profession which is devoted to jurisprudence, and which is, therefore, continually concerned with questions of right and wrong, must itself inevitably be governed by high ethical standards. Indeed no one of the professions affords a nobler intellectual pursuit, and not one establishes for the conduct of its members a higher moral standard. A written code of legal ethics has never been formulated by the American Bar Association. And in the admirable address delivered not long ago before the students of this school by Judge Landon of the New York Court of Appeals that distinguished jurist stated that he did not know that any bar association had attempted to establish in concrete detail a comprehensive professional code. A code of medical ethics was adopted a number of years ago by the medical profession in the United States, acting through its national organization. I shall not venture to explain why the lawyers of the United States have failed to act in a matter of this importance. It is not to the credit of the legal profession that it has been in this respect so much behind the medical profession. Action has, however, recently been taken by a few of the states. A code of legal ethics was adopted in 1898 by the Bar Association of Colorado. And in 1903 the Kentucky State Bar Association did likewise. It is possible that similar action may have been taken in other states. I wish it might be done in all the states and by the American Bar Association as well. I am sure that such action would prove helpful to the profession throughout the country. I cannot yield assent to the proposition that it is better that rules of conduct should not be reduced to exact detail lest the spirit be cramped in the letter. The men of light and leading who do not stand in need of any written code will not permit themselves to be cramped by the letter of it, and those whose conscience is less sensitive and whose ideas of professional honor are not so clear and strong as they might be are

likely to find themselves considerably helped by it. Law has in every community an educative force. And a code of legal ethics approved by the Bar Association of the country could not but exert a wholesome influence upon the American bar.

The French bar is controlled by a written code of ethics. It regulates by the highest standard every phase of the advocate's professional life. "Nothing," it has been said, "is too small for its care, nothing too great for its control." It inculcates diligence, sobriety, truth, honesty, courtesy, dignity and independence. It applies to every relation of the advocate, to his general duties as well as to his duty to his clients, to the judges and to his brother advocates. It affirms that one cannot be a perfect advocate, if he be not a good and honest man. In each judicial department of that country exists a council of advocates which tries all infractions of the code, and censures, suspends, or dismisses those who are found guilty of a transgression of the ethics of the profession. The bar of that country is not only a thoroughly educated body of men, but one trained "in the highest school of professional ethics." It is said to be organized to the encouragement and advancement of everything advantageous to the state, and to the resistance of everything hurtful to the state.

As the law of the land is not to be found in the written statutes alone, but may be derived from unwritten sources, so we are not to assume, because a written code of legal ethics has not been formally adopted in a particular state, that therefore none exists. Professional ethics can never be dependent on a written code. A man of sound moral sense does not abstain from murder or theft because legislatures have enacted laws prohibiting, under penalty, such a violation of man's rights to life and property. And a lawyer is unworthy of membership in the profession who would regulate his conduct solely according to what the law permits rather than by what morality and honor require. But if we seek for the rules which should govern professional conduct, we find them indicated in the oaths administered to those who are admitted to practice, and in the judicial decisions handed down in cases in which lawyers have been rebuked or disbarred, as well as in the precepts which have been handed down from one generation of lawyers to another as showing the consensus of opinion which has prevailed among the honorable members of the profession in this and other lands.

I have noted in some of the addresses which have been delivered by those who have spoken here on similar occasions that reference has been made to the oaths administered to members of the bar in certain of the states of this country. I have found in none of the

oaths to which they have made reference, not even in that administered in the state of Washington or in the New England States, a more admirable setting forth of the ethical duties of the lawyer than is to be found in the oath which is taken by the lawyers of Germany. In that country the lawyer swears obedience to the constitution and the laws, and to faithfully and industriously aid everybody, the poor man quite as willingly as the rich man,—without fear of the courts—to his right, by advice, speech and action; that he will not overcharge parties with fees; not obstruct the amicable settlement of law suits, but further it is as much as possible; not retard or hinder justice in any way whatsoever; never give countenance to dishonest designs of parties, particularly not suggest to any party or any accused person groundless subterfuges and statements contrary to the truth, or recantation; and if he should find the cause of a party, in his persuasion, to be without foundation, or not based upon the law, and he could not amicably dissuade such party, as is his duty to do from its intent, that he will not represent it in court in such cause any longer; that he will never, in any case taken in hand by him, speak and act more than he is instructed to do; that he will keep secrets intrusted to him inviolate; take care of and return in good time public papers and records laid before him or communicated to him; keep safely funds which may be intrusted to him, and give a conscientious account of them; and finally show to the public authorities and courts, before which he appears as counsel, due respect, and abstain from all invective against the same; also that he will not be prevented from the fulfillment of these duties either by favor, gifts, friendship or enmity, or any other impure motive, and that he will altogether so behave as is becoming and befitting a conscientious and duteous attorney and counsellor at law. In any country which administers such an oath a tricky, quibbling and mendacious bar is impossible.

The ethical basis of conduct for the lawyer is the same as for any other member of society. That which one cannot honorably do as a man he cannot honorably do as a lawyer. The profession imposes no obligations upon its members which degrade true manhood and debase those higher ideals which men of nobility and chivalry always cherish. In the pursuit of all ends, whether within or without the profession, we are alike restrained by God's law as well as by man's law to good means and to good ends. No one, be he lawyer or layman, has a right to seek wrong ends by good means. And no one has a right to seek good ends by wrong means. We cannot do evil that good may come of it. The due administration of justice

does not involve a subversion of ordinary ethical rules, and the general code of morals makes no exception in favor of the legal profession, but is applicable alike to all classes and conditions of men.

Lord Macaulay in his great essay on Lord Bacon gives the impression that in England the lawyer's code of ethics permitted a man "with a wig on his head and a band round his neck," to do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire. Macaulay intimates that lawyers of his day, knowing a statement to be true, thought themselves nevertheless justified in doing all that could be done "by sophistry, by rhetoric, by solemn asseveration, by indignant exclamation, by play of features, by terrifying one honest witness, by perplexing another, to cause a jury to think that statement false." If the code of legal ethics which existed in England when Macaulay wrote countenanced the conduct to which he refers,—and I am frank to say I do not believe it did—it is certainly true that no honorable member of the profession in either country to-day recognizes any such code. There is no code of ethics either in England or in America which is based upon the theory that there are two kinds of morality; that one kind applies to the legal profession and the other to the rest of mankind. If one undertakes to tell you that there is one morality for the bar and another for the rest of the world, be assured he is a teacher of false doctrine. To follow after him is to go to your own undoing.

John Milton's father intended him for the ministry—a high and sacred calling. But the choice of the father was not the choice of the son. Milton refused to enter the ministry because he was unwilling to enter a profession which he thought required him to advocate doctrines which he did not believe to be true. Can a man dominated by as strict a sense of honor as characterized Milton become a lawyer? That question has long been a mooted one. Many men have in all the years come to the bar with serious misgivings concerning it. That devout Christian men of exalted character have entered the profession and attained to eminence in it cannot be denied. How could they do it? inquires the casuist. How can an honorable man enter a profession in which he will have possibly to maintain the side that is wrong? As only one side can be right, the lawyer, he tells us, must be half the time endeavoring to establish that which is wrong, seeking to accomplish injustice.

The fallacy of his contention lies in his failure to appreciate that in its inception at least there are two sides to every case. The purpose of the litigation is to ascertain what the exact facts are and then



apply the law to the facts. "It is only on the anvil of discussion that the spark of truth can be struck out." It is seldom the case that a lawyer goes into a litigation believing that his client is in the wrong. Lawyers do not go into court to lose cases, but to win them. Their reputation is enhanced by the victories they win. It is not improved by the defeats they suffer. A venerable jurist, of the finest sense of honor and the purest integrity, is quoted as saying after fifty years of the most laborious professional life, that he had never but once thought his client in the wrong.

But the chief difficulty which the casuist encounters is to reconcile with his standards of honor the defense of one believed to be guilty of crime. So far as the majority of lawyers is concerned the question is little more than an academic speculation. The practice of the criminal law engages the attention of very few members of the bar. In the popular mind, however, the profession is often condemned because of the opinion which so many people entertain that the lawyer, in defending a known criminal, is endeavoring to cheat the law and acquit the prisoner and thus wrong society and the state.

Wendell Phillips in his speech on Rufus Choate pictured a Parthenon of jurists in which the visitor was to be shown from statue to statue. Greece was to exhibit her Solon and his code of laws, and Rome her Papinian, and France her D'Aguesseau, and England her Erskine; and then New England was to point to Choate and say "This is Choate, who made it safe to murder, and of whose health thieves inquired before they began to steal." Now if Choate in the practice of his profession made it safe to murder and to steal, we shall be compelled to admit that his occupation was a very poor one. To call such business "a little shady" would be to dignify it too highly. It would clearly deserve condemnation as something unworthy and quite indefensible. And yet no man in Massachusetts stood higher than Choate. No man questioned his personal integrity. No man cast suspicion upon his uprightness of life. He was not merely of brilliant intellect, but he was likewise of high ideals. The old commonwealth of Massachusetts holds him in reverence to this day as one of her greatest and noblest sons. In the court house at Boston is a statue erected to perpetuate his fame.

A theory which condemns his calling while it exalts the man cannot be sound. The fallacy of it is easily shown. In every civilized state the principle is recognized that the government ought to punish only those who have violated its laws and whose guilt has been established in accordance with the forms which have been fixed by law. That this principle should be adhered to is essential to moral-

ity and to the maintenance of social order. The lawyer who insists that a man accused of crime shall not be punished until his violation of the law he is charged with breaking has been established in the courts and his guilt proven by evidence such as the law requires in that class of cases, is discharging a duty to the state which is as important to society as any he can render. The state has no right to take life or deprive a citizen of his liberty unless he has broken a law and that fact has been established by legal evidence in the manner prescribed by law. A departure from that proposition means the overthrow of social order. In its place would come lynch law and anarchy.

It is because of this fundamental truth that the lawyer is justified in appearing in court in defence of a criminal. He is there not to subvert the laws of his country but to conserve them, not to pull down the pillars of the state but to uphold them, not to find some way by which a wicked man is to be let loose to prey upon society to its undoing. He is there to see that justice is done and that no man shall be condemned by the law until his guilt has been established by the law and in accordance with the forms of law. In rendering this service to the prisoner the lawyer discharges a duty to the state as well as to the defendant, and he is not called on to do anything an honorable man should not do. In discharging this duty he must, of course, be governed by the same high principles by which his conduct is governed in other cases. He cannot misrepresent either the law or the facts. He cannot play the part of a trickster and pervert evidence or quibble with words.

A question which has troubled the conscience of many has been whether a lawyer can properly take advantage of the statute of frauds or the statute of limitations to defeat a claim otherwise valid and which is asserted against his client. It is necessary to remember that these rules have been prescribed because they were found essential to the due administration of justice. They are regarded by the courts and by the profession as salutary. For this reason, in the judgment of the profession, it is not immoral for a lawyer to assist in enforcing them against a negligent party who has ignored them.

An honorable lawyer who respects himself and his profession will decline, with contempt, all cases in which a party seeks to sustain some unconscionable advantage which he may have obtained through fraud, accident or mistake. "Yes," Mr. Herndon who was his partner reports Mr. Lincoln as advising a client, "we can doubtless gain your case for you; we can set a whole neighborhood at

loggerheads; we can distress a widowed mother and her six fatherless children, and thereby get for you six hundred dollars to which you seem to have a legal claim, but which rightfully belongs as much to the woman and her children as it does to you. You must remember, however, that some things legally right are not morally right. We shall not take your case, but we will give you a little advice for which we will charge you nothing. You seem to be a sprightly, energetic man. We would advise you to try your hand at making six hundred dollars in some other way."

Among the cases which no lawyer should touch are the fraudulent divorces which parties obtain on false allegations of residence, and on testimony which makes a false presentation of fact to the court. Any lawyer who meddles with such cases of necessity forfeits his reputation.

The duty of the lawyer to his client is to advise and assist him in every honorable way to maintain and defend those rights and privileges secured to him by the constitution and the laws of the country. The relation existing between the lawyer and his client imposes upon the former as well as upon the latter the duty of observing the utmost candor. If authorities are conflicting upon the question of law which the proposed litigation involves, the client should be fully informed of the fact and not urged to engage in a doubtful contest without full knowledge of its uncertainty. And if a case is of such a nature that a slight variation of the proof might change the entire legal aspect, that fact must be made known to the client also. Litigation should never be commenced until the client fully understands the situation.

It is the duty of a lawyer to discourage his client from litigation and endeavor, if possible, to bring about a settlement of the controversy by agreement between the parties when this can be done without an improper sacrifice of his rights. "As a peacemaker," said Lincoln, "the lawyer has a superior opportunity of being a good man." Lawyers who seek to avoid litigation and compromise difficulties are of that number to whom the beatitude, "Blessed are the peacemakers," most fittingly applies.

In marked contrast is the lawyer who goes about looking for litigation. That kind of a lawyer is a mortification to his professional brethren. To stir up strife is contrary to law and forbidden in morals. No man who has self-respect, or who regards the ethics of the profession will chase an ambulance or search the records to discover defects in titles in order that he may secure a client and commence a suit.

A lawyer consulted upon a matter concerning which he is uncertain as to what the law really is owes it to his client and to his own reputation to reserve his opinion until he can take time for investigation and reflection. Some lawyers and especially those who have come recently to the bar, fear the effect upon a client of not appearing ready at once to express a definite opinion on any question. The practice in the end brings them into disrepute.

The lawyer cannot assume that he has no moral responsibility for the unconscionable acts of a client. The lawyer is not without fault who intentionally so draws a contract or drafts an instrument that a client may take unfair advantage of another by virtue of some clause, the true meaning of which he has concealed in legal verbiage. He who assists a dishonest client by counselling him how to organize and so exploit a corporation as to defraud the public and obtain good money for worthless stock is as much a scoundrel as is his unscrupulous client.

One cannot advise a client how he can so dispose of his property as to defraud his creditors and co-operate with him in accomplishing such a result and not be as guilty as his client. That there are such lawyers is unfortunately true. But this class of men is likely to discover that while there were no lawyers in Dante's *Inferno* some will be found in the real *Inferno*.

The duty which the lawyer owes his client imposes no obligation to make that client's malevolence toward the opposing litigant his own. To abuse the opposite party and indulge in offensive personalities for no better purpose than to gratify the whims and malicious feelings of a client is most unworthy of a high-minded attorney. D'Aguesseau, who is regarded as the ornament of the century in which he lived and who attained to the high office of Chancellor of France, said to the bar of his country: "Let the zeal which you bring to the defence of your clients be incapable of making you the ministers of their passion, and the organs of their secret malignity."

In speaking of the duty of the lawyer to his client I desire to warn you against the mistake of governing your conduct according to the standard which it is too commonly supposed that Lord Brougham laid down in his remarkable speech in defence of Queen Caroline. He there said: "An advocate, by the sacred duty which he owes to his client, knows, in the discharge of that office, but one person in the world—that client and none other. To save that client by all expedient means, to protect that client at all hazards and costs to all others,—and among others, to himself—is the highest and most unquestioned of his duties; and he must not regard the alarm,

the suffering, the torment, the destruction which he may bring upon the other. Nay, separating even the duties of a patriot from those of an advocate, and casting them, if need be, to the wind, he must go on, reckless of the consequences, if his fate it should unhappily be to involve his country in confusion for his client's protection." Giving to this utterance the meaning which is ordinarily placed upon it I have only to say that it has been properly denounced as "a degenerate view" of professional duty and honor. The Court of Appeals has fittingly said of it that, "such a proposition shocks the moral sense." (32 N. Y. 133.)

But Lord Brougham, although he spoke in the heat of conflict, never uttered the words to which I have referred with any such meaning as too often has been wrongly given to them. Those words are said to have been understood at the time and to have been accepted by the better opinion since as a veiled threat to the crown officers that Brougham, if driven to the wall by the exposure of the imprudencies of his client,—not calling them by a harsher name—would retaliate by raising the question of the King's marriage to Mrs. Fitzherbert, regardless of the serious consequences which might result regarding the title to the throne and the succession.

The ethics of the profession require that in the conduct of litigation the utmost courtesy should be extended to the counsel on the opposing side. Litigation is not between attorneys but between clients, and attorneys are not to try each other but the merits of the cause. Whatever ill feeling may exist between the litigants their attorneys are not to partake of it in their demeanor toward each other. As it is improper to abuse and vilify the opposite party to the suit, or his witnesses, merely to gratify the malevolent feeling of a client, so it is contrary to all propriety to indulge in offensive comments upon his counsel, ridiculing his personal peculiarities and idiosyncracies. Gentlemen never lay aside their dignity and descend to blackguardism. If such conduct calls forth the applause of the vulgar, it provokes the contempt of all whose opinion is of value.

If the opposite counsel fail to show that courtesy which is due and it becomes necessary to rebuke him the circumstances must determine how it shall be done. A story is told that on one occasion a lawyer challenged a juror because of his personal acquaintance with Mr. Lincoln, who was on the opposite side. When it came time for Mr. Lincoln to examine he gravely followed his adversary's lead and began to ask the talesmen whether they were acquainted with his opponent. After two or three had been thus questioned the judge interfered. "Now, Mr. Lincoln," he observed severely,

"you are wasting time. The mere fact that a juror knows your opponent does not disqualify him." "No, your Honor," responded Lincoln, dryly. "But I am afraid some of the gentlemen may *not* know him, which would place me at a decided disadvantage."

In the celebrated *Speculum Juris* of Guillaume Durand, who died in 1296, I find directions regarding an advocate's behavior to the advocates on the other side. "You are not to indulge in personalities towards him," he says, "but to treat him decorously; unless indeed he treat you rudely: and when replying to his argument you should commend him slightly, but not too much, and commend him by equivocal words. But you must not treat your adversary with contumely, or call him, in plain words, a ruffian or a prevaricator; or insinuate as much, as by saying, '*I am not a thief,*' thereby intimating that he is. But if the other accuse you of falsehood, you may safely say '*You are a liar,*' but you should protest that you do not say so with intent to injure him, but only to defend your own cause. But if your adversary do not revile you, you should use temperate words, such as, '*with your permission,*' or, '*saving your reverence,*' or some such words. If he have listened to you patiently, you are to reciprocate, but if he have made a noise or a tittering, you may do the like. You are to note well and retain in your memory what he says; for if he has spoken long, it is hard if you cannot find fault with something. It is better to be silent than to speak foolishly; according to the proverb *Mas val callar que fol parlar*. . . . If your adversary seem to get the better in argument, or if your cause be weak, go off warily to another point; and if he be of a bilious temperament, you should indirectly and very smoothly say something to make him angry; for then he will not be able to shape well his speech." (Year Book 32-33 Edward I, p. XXV.)

The duty of the lawyer to the court pledges him by his oath of office to diligent service and good faith to the court as well as to his client. He must strictly observe courtesy and truthfulness. By stating as facts what he knows are not facts, to deceive the court, by misquoting evidence, by making unfair citations of authorities, the lawyer violates his oath and the ethics of his profession and seeks by dishonest methods to support his cause. To mislead the court has been called a sort of "domestic treason." He may be sure that his sin will find him out. Deceit in one case may sometimes win a case, but the man who practiced it has sacrificed his future and destroyed his influence with the court. The lawyer, as an officer of the court, must give fair and candid counsel to the judge if he expects to have respect accorded to his utterances.

In Durand's *Speculum Juris* to which I before referred, advice is given as to the behavior of advocates towards the judges. As he wrote six hundred years ago I call attention to his words: "When before the judge, you are to take off your cap and make an obeisance, graduated according to the rank of the judge. Do not be loquacious. Address the judge in a manner that may be pleasing to him, and if he be angry, do not rejoin. If a point is being mooted in another's cause, and you know a canon or law which decides it, cite it boldly, for thus you will have credit with the judge in a case of your own. But, if you are acquainted with the judge, be silent, for perhaps he will call you to consult with him, according to the Lombard custom. Do not laugh causelessly before the judge. When the judge speaks, listen respectfully and then laud his wisdom and eloquence. When your time for speaking comes, rise gracefully, but not arrogantly; put on an affable and pleasant look; do not move your head or feet awkwardly. A proper management of tongue, feet, hands and eyes is important. After a slight pause, begin by requesting a favorable hearing from the judge and the audience, and by commending the judge for various (special) qualities; but be careful about attributing all these to one person; and be careful not to say anything to offend the judge. Some say that an advocate should frequently go and whisper to the judge so that he on the other side may fancy that they are talking about him and thus lose his temper."

But if courtesy is due from the lawyer to the court it is also due from the court to the lawyer. The obligation is reciprocal. Three hundred years after the *Speculum Juris* was written Bacon wrote his Essay on Judicature, of which it has been said that those on the bench would do well to read it over every year. In writing of the duty of the judge towards the attorney Bacon said: "There is due from the judge some commendation and gracing, when causes are well-handled and fair pleaded, especially towards the side which obtaineth not; for that upholds in the client the reputation of his counsel, and beats down in him the conceit of his cause."

Occasions sometimes arise, though happily they are few in number, when an advocate must decide between the duty which he owes the client and the duty he owes the court. The necessity arose upon the trial of the Dean of St. Asaph. The jury was trying to return a verdict which would have released the defendant from the crime with which he was charged. Mr. Justice Buller was endeavoring to record the verdict as the jury did not wish. Mr. Erskine persisted that the verdict should be recorded as the jury desired. "Sit

down, Sir!" said the court. "Remember your duty or I shall be obliged to proceed in another manner." "Your Lordship," Erskine replied, "may proceed in what manner you think fit; I know my duty as well as your Lordship knows yours. I shall not alter my conduct." This man, regarded as the greatest advocate of all time, always had proper respect for the court, but never permitted a judge to unduly interfere in the discharge of what he regarded as his duty to his client. The admonition of the mighty Mansfield himself could not deter him while he was yet a briefless barrister. To Mansfield's statement that Lord Sandwich was not before the court Erskine answered: "I know he is not before the court, and for that very reason I will bring him before the court." Lieber states the principle which should govern counsel in cases of this character. "A true advocate," he says, "will never forget that in defending a citizen he is as much the representative of the law of the land, which wills protection to everyone, as is the judge, and, with all respect for the bench, he will, if the case calls for it, stand up for his client's rights." The true lawyer who respects himself and possesses both an intellectual and a moral conscience will distinguish between the courtesy which is due the bench and that obsequious and servile subserviency to the court which no judge has any right to demand, and which, if demanded, ought never to be accorded. The rights of a client are never to be sacrificed in order that the attorney may maintain his "standing" with the court.

As the lawyer is an officer of the court he is by that fact an officer of the state, the judiciary being one of three co-ordinate departments of the government. Justinian's direction to Tribonian was, "commence then to instruct scholars in the science of the laws and conduct them along the way we have opened in order to make them good officers of justice *and of the state*." Originally in England the right to appoint attorneys was, like the right to appoint the judges, a royal privilege. Prior to the statute of Westminster II, c. 10, (1285), all attorneys were made by letters patent issued under the broad seal, and which commanded the justices to admit the persons named to be attorneys of the court. In New Jersey to this day attorneys-at-law are invested with their privileges by letters patent issued by the governor of the state on the recommendation of the Supreme Court certifying that the persons named have been found possessed of the proper qualifications. (70 N. J. L. 537.) The lawyer, because he is in a sense an officer of the state, owes to the government a greater responsibility than the ordinary citizen.



Among the duties which the lawyer owes the state is that of saving the judiciary from becoming the spoils of party. The selection of the judges should never be left to that odious creature—a party boss, whose dominant influence in American politics constitutes so serious a menace to our institutions, and who is so ill fitted to pass upon the fitness of men for the judicial office. The interests of the Commonwealth and of the profession require that only men of learning, probity and of the judicial temperament should be permitted to sit in the high seats of justice. And whether a man is possessed of these qualifications is known best to his professional brethren. It would be well, therefore, if judicial nominations could be determined or influenced by the profession rather than by the politicians. The bar associations in New York and Chicago on several occasions have set an example to the bar of the country which is worthy of all emulation in taking active steps to secure a non-partisan judiciary.

Another duty which the lawyer owes the state is to maintain the confidence of the people in the courts and to defend the judiciary against unjust criticism, which is not always saved from being mischievous by the fact that it is wholly false. A reckless criticism of the courts indulged in by ignorant and mistaken agitators may do much harm, and in our country has already to some extent and among certain classes of people created a most unfortunate distrust of the impartiality of our judicial tribunals. American judges, with here and there a rare exception, are men of high honor who seek to hold the scales of justice even. No one knows this better than the lawyers who practice in their courts, and no one is better qualified to say so when the necessity arises. There are persons who profess to think that

"The net of law is spread so wide,  
No sinner from its sweep may hide.  
Its meshes are so fine and strong,  
They take in every child of wrong.  
O wondrous web of mystery!  
Big fish alone can creep through thee."

The prejudice is not peculiar to our time. Shakespeare gave expression to the same feeling in his day when he wrote:

"In the corrupted currents of this world  
Offence's gilded hands may shove by justice  
And oft 'tis seen the wicked prize itself  
Buys out the laws."

The same thought was again expressed when he said:

"Plate sin with gold  
And the strong lance of justice hurtless breaks."

The profession knows that this prejudice is ill founded. The country has lately seen United States senators convicted of crime, and in a United States Court in Georgia two men sentenced to the penitentiary who had defrauded the government of a million and a half of money. That laws have been systematically violated for years by great corporations and that those responsible have gone unpunished cannot be denied. But courts are not responsible for the fact that in the eighteen years existence of the Interstate Commerce law only one conviction for a violation of the law was obtained, and that until last December there had not been a single conviction under the Elkins act of 1903. There can be no convictions unless officials whose duty it is to institute the necessary proceedings bring the violators of law to the bar of justice. Let the blame always rest where it belongs, but never where it does not belong.

Another duty which is due from the lawyer to the state is an honorable discharge of his obligations as a law-maker in the legislative assemblies of state and nation. Lawyers predominate in all halls of legislation. They are sent there because their knowledge of existing laws, and of the defects in those laws and how they can best be remedied, qualify them above other men for the work of the law-giver. They are expected to see that only good and effective laws are placed in the statute books. They are in the legislature as counsel for the state, and their duty is to legislate in the interests of the state. The ethical obligation is to the Commonwealth.

But the lawyers who get themselves elected to legislative bodies not to serve the state but to further private interests, and who really represent corporations seeking special privileges are as false to their trust as lawyers who in the courts betray their clients. They are in fact more deserving of censure for they betray not one client but a whole state. It is a shameful fact that lawyers who resist with hot indignation any suggestion to betray the cause of a client pending before the courts are yet willing to betray the cause of the people in the halls of legislation. They sacrifice the welfare of the state to private interests and seem unconscious of the infamy. The contentment of a people is dependent on a system of wise, just and equal laws. When a conviction becomes dominant in the popular mind that legislative bodies are rotten at the core, that legislation and official places are bought and sold as in the days of the Roman Empire, that corporations write the laws by which they are supposed to be regulated, and that those laws are so framed that the public may be plundered "according to the statutes in such case made and provided," and that it has been possible for corporations to intentionally

ruin some and enrich others,—these things tend to provoke a socialistic and anarchistic spirit and to cause men to lose confidence in the honesty and beneficence of the government. The country is to-day passing through a period of national humiliation. Recent investigations have brought to public notice shameless deeds which dishonor the American character and cause honest men to hang their heads in sorrow and mortification. Each new day brings some new revelation, and borne on the wings of every wind come startling disclosures, affecting the leading corporations of the country. Thirty years ago in the Constitutional Convention of Pennsylvania, Jeremiah S. Black, a great and brilliant lawyer, complained of the corruption that existed even then in the legislature of his own state. He spoke of the fact that the Pennsylvania Railroad Company had been clothed with imperial power. "That corporation," he said, "has grown so mighty that its little finger is thicker than the loins of the Commonwealth which created it. I do not say that it bestrides your narrow state like a Colossus, for the ancient Colossus of Rhodes was but the image of a pigmy in comparison to this Colossus of railroads." And then he went on to declare that "If the honest citizens of the state who have been so basely betrayed by these miscreants (the members of the legislature) would obey the impulses of their natural indignation, and had infinite power to work their will upon them, they would set them upon the remotest battlements of God's creation—far out upon the borders of chaos and old night—and then lash them naked around the circumference of the universe." Corruption, he said, was getting worse and worse not only in Pennsylvania but throughout the country, and he predicted that our institutions must utterly perish unless we stopped the mischief and cut out the cancer. I cannot but think that the conditions which he described, and which have disgraced other states than his, would never have been possible if the lawyers in legislative bodies served their client, the Commonwealth, with the same fidelity with which they serve their private clients.

It sometimes becomes the duty of the bar to resist the government itself, and on such occasions the advocate will never permit any personal considerations to interfere with the discharge of that duty. No lawyer will forget Erskine's declaration that he would at all hazards assist the dignity, independence and integrity of the English bar, adding that: "From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end." Chateau-

briand in his "Melanges" has described, in words which the world has not forgotten, the defense of Louis Sixteenth by M. de Malesherbes. When the King was dragged before the convention for judicial murder Malesherbes came forth from his retirement and volunteered his services for his defense. "Plutarch," says Chateaubriand, "has transmitted to us nothing more heroic. When the King was led to the convention M. de Malesherbes addressed him only as 'Sire' and 'Your Majesty.' Treilhard heard him, and cried out furiously, 'What renders you so bold to use words which the convention has prescribed?' 'My contempt for you and for life,' replied M. de Malesherbes. This cost Malesherbes his head, but in defending his King he had discharged his duty fearlessly. In our own day we have seen a brilliant French advocate, without hope of remuneration and knowing that his life was in danger and that the public sentiment of his country was against him, walk into the arena of justice and vindicate the rights of Dreyfus against the government and the military tribunals of France.

Professional ethics deafen the ear of the lawyer to the clamor of the mob as well as to the threats of the government. The louder the popular clamor the more imperative becomes the duty of the lawyer to face and defy it. Men, when they are condemned, must be condemned by the law and not be convicted and punished by the public outcry. John Adams was right when he said that one of the best services he ever rendered his country was when in 1770 he defended in the courts of Boston Captain Preston and his six soldiers of the British army who were charged with murder in firing upon the populace. Mr. Adams vindicated the majesty of the law although he called down on his own head at the time a great clamor of rebuke and wrath.

As Froissart said of his chronicles of chivalry, let mention be made of these things "to encourage all valorous hearts and to show them honorable example."

Mr. Gladstone, in 1894, at a dinner given in honor of a distinguished member of the French bar used this language: "I have always felt that the bar is inseparable from our national life, from the security of our national institutions, but never, so long as I looked at England alone, did I understand the full extent of its value. Some years ago, it was my lot to be a witness of cruel oppression in a country in the South of Europe. There the executive power did not merely break the law, but deliberately supplanted it and set it aside and established in its stead a system of pure arbitrary will. To my astonishment, I found that the audacity of tyranny

which had put down chambers and municipalities and had extinguished the press, had not been able to do one thing, to *silence the bar*. I found in the courts of justice, under the bayonets of soldiers—for they bristled with bayonets—in the teeth of power, in contempt of corruption and in defiance of violence and arbitrary rule, lawyers rising in their places and defending the cause of the accused, with a freedom and fearlessness which could not be surpassed in free England."

That justice travels with a leaden hoof is the fault, in a great degree, of our profession. The law's delay is now, as in the days of the Prince of Denmark, among the greatest "ills that flesh is heir to." The lawyer's accountability in this matter is in part due to the fact that in all legislative bodies the lawyers shape legislation and can establish the modes of judicial procedure. It is also due in part to the dilatory tactics of lawyers who in actual litigation seek by every possible means to prevent a decision being reached on the merits, and when it has been reached endeavor to prevent its being carried into effect. A lawyer is guilty of discreditable conduct who seeks with persistent ingenuity and by technical attacks on immaterial points in either a civil or a criminal proceeding to defeat a judgment sustained alike by the law and the evidence. In criminal cases, when the evidence has established beyond a doubt the guilt of the accused and when juries have been properly instructed and no errors have been committed, cases are appealed with no reason for doing so except to delay execution of judgment. The Court of Appeals of New York has rebuked the conduct of attorneys of this sort who seek to use the forms of law to subvert the law. "Attorneys and counsellors admitted to practice in the courts of this state are under a duty," said the court, "to aid in the administration of justice, and they cannot consistently with this duty engage in vexatious proceedings merely for the purpose of undermining the final judgments of the courts and defeating the behests of the law. It ought to be a subject of inquiry, therefore, whether they can thus become the allies of the criminal classes and the foes of organized society without exposing themselves to the disciplinary powers of the Supreme Court." (128 N. Y. 589.) Attorneys who indulge in such conduct help to bring the administration of justice into disrepute, and create a lawless spirit among the people who grow tired of the law's delays and resort to lynchings, which disgrace the country and shock the world.

In so far as delays are due to old and defective methods of procedure it is the duty of the profession to lead in their reform. That

"justice delayed is justice denied" is but too true. The responsibility is ours, and so long as such a condition is permitted to exist the public suffers and the profession is damaged. The English courts, once the most dilatory in the world, have become in recent years the most expeditious. So shameful were the delays of the English Court of Chancery, so graphically described by Dickens in "Bleak House," that someone has said that over its portals should have been written Dante's inscription on the gates of hell, "He who enters here leaves Hope behind." But even in the courts of the common law long delays cast a shadow over the fortunes of litigants. The lawyers of England reformed these abuses, and more effective methods of procedure were adopted. In our own country in many states where a like necessity exists like action should be taken to remove what is a serious menace to the authority and usefulness of the courts.

The enormous expense to which litigants are in some of our states subjected amounts in many cases to a denial of justice. The fees of stenographers and court officials are often excessive and not infrequently are greater than the compensation of counsel. Law ought to be cheap and not dear, and the poor should not feel that law is the patrimony of the rich. It is the duty of the bar of America to take heed that in our country the historian of the future shall not write of us what Gibbon wrote of the Roman Empire prior to the reforms of Justinian. "The expense of the pursuit," said he, "sometimes exceeded the value of the prize and the fairest rights were abandoned by the poverty or prudence of the claimants. Such costly justice might tend to abate the spirit of litigation, but the unequal pressure seems only to increase the influence of the rich and to aggravate the misery of the poor. By these dilatory and expensive proceedings the wealthy pleader obtains a more certain advantage than he could hope from the accidental corruption of a judge."

You come to the bar, gentlemen, at a critical period in the country's history. Never before since the government was established has agitation against existing institutions been so reckless and revolutionary and so general as now. The duty of the lawyer to the state assumes new importance in the face of the conditions which now confront this nation. Let me, therefore, commend to your thoughtful attention the weighty words of a great constitutional lawyer. In his address as president of the American Bar Association in 1894 the late Chief Justice Cooley said: "What I desire to impress at this time upon the members of the legal profession is that every one of them is or should be, from his very position and from

the license which gives him special privileges in the determination of legal questions and controversies, a public leader and teacher, whose obligations to support the constitution and laws and to act with all due fidelity to the courts is not fully performed when the fundamental organization of society is assailed or threatened, or the laws defied or likely to be in the community in which he lives, as a result of revolutionary purpose, or of ignorance, or unreasoning passion, unless he comes to the front as a supporter of settled institutions and of public order, and does what he properly and lawfully can to correct any sentiment, general or local, that would in itself be a public danger, or be likely to lead to disorder or unlawful violence."

To this eminent jurist it seemed a low and very unworthy view of the lawyer's office to assume that his duty was simply to prosecute or defend in the courts for a compensation to be paid, and that he owed no duty to society to expose false theories and counteract public ignorance and inculcate respect for law and courts and government and the rights of property.

*Henry Wade Rogers, LL.D.,  
Dean of the Yale Law School.*

## THE PAR VALUE OF STOCK.

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It is quite apparent that there are some features of our corporate system which require re-adjustment, if not abandonment. Indeed anything which achieves so widespread and frantic a popularity among all sorts and conditions of men is apt to arouse a suspicion that it possesses more than a legitimate attractiveness. And the truth of the matter seems to be that corporations, like all other human institutions representing a growth, have had a tendency to preserve in crystalized form, elements which have lost their usefulness or are even positively harmful.

A great deal of remedial legislation has been suggested and some has been adopted. There are, however, at least two points of attack and it seems as though the efforts had been directed principally towards the less easily controllable. In other words, it is possible to change some of the present characteristics so that when a corporation comes into existence it will necessarily act in a manner different from that which is now possible for it. On the other hand, all the present features may be retained and laws adopted imposing penalties for any improper use of such powers. The majority of writers and legislators appear to direct their attention to this second branch and by suggesting penalties as, for example, the imposition of a personal liability upon directors or stockholders, to confine corporate operations within proper bounds.

But although repressive measures may in some cases be the only practical remedy, it is better to clip a bird's wings than to resolve to punish it if it attempts to fly too much. And if it appear that a certain feature is not essential to the corporate mechanism or has been outgrown and restrictive statutes are not able to prevent its abuse, it would certainly be more simple and efficacious to abolish it altogether with only a transient inconvenience.

Fiat money, the threat of which occasionally looms above the financial horizon and fills conservative men with anxiety, is widely discussed and widely denounced. Political economists unite in earnest assertions that nothing but evil can result from such attempts to create value by stamping paper with a symbol endorsed by the Government. It is a little curious, therefore, that



an analogous feature of corporate organization seems to be taken for granted as a necessary incident, and one scarcely hears a suggestion that it be discontinued. This is the practice of requiring a "par" or face valuation for every share of stock.

Our Stock Corporation Laws provide that the certificate of incorporation shall set forth the arbitrary figure which of course is derived from the total amount of the "capitalization," divided by the number of shares. That capitalization itself has lost all dignity and significance, so far as ordinary mercantile corporations are concerned, is evident enough, if only from the paltry considerations by which its amount is determined. Thus Mr. Dill in commenting on the General Corporation Law of New Jersey, naively observes:<sup>1</sup> "In view of the fact that the cost of filing the certificate of incorporation is the same (i. e. \$25.00) for any amount of total authorized capital not exceeding \$125,000.00, it is customary to insert in the certificate power to issue stock to the amount of \$100,000.00 or \$125,000.00." A trifling organization tax, in other words, now settles the amount which was originally intended to represent so much money paid in to the treasury of the company.

Of course, if, as is the case with "monied" corporations, the entire capital had to be paid by the stock subscribers in cash, and thereafter maintained intact as a permanent and undiminished fund above all debts, there would be some justification for establishing a par value. But as stock may now be issued for money, labor performed, or property, and, in the absence of fraud, no question may be raised as to the actual value of the labor or property by which the payment is made, the gateway has been opened for the most astounding inflation. It is notorious that shares are now delivered in return for a variety of intangible rights at preposterous valuations and then with the unctious phrase "full paid and non-assessable" attached, re-issued to the public for whatever price they may be induced to pay. The par value, consequently, has become little more than an attempt to create the semblance of value by the activity of the printing press. From the moment of their issue to the time of the dissolution of the corporation, the shares never see the value that is bestowed upon them and set forth blandly in the certificates except through some very unusual circumstance.

That it has become the merest fiction is also evident from the fact that courts have disregarded it when recognition would have

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1. Dill on Corporations, 4th ed., p. 22.

been inequitable. Thus in an instructive Pennsylvania case,<sup>2</sup> a company was "capitalized" at \$1,000,000 and stock certificates for this amount "at par" were outstanding, but only five dollars had been paid upon each fifty dollar share, or \$100,000 altogether. The charter provided that the company could not issue bonds in excess of fifty per cent "of the par value of the stock." Suit was brought to enjoin an issue of \$250,000 of bonds and an injunction was granted. The court declined to recognize the fifty dollar "par value" established by the charter, and held that as only five dollars a share had been received by the company, that was the real par value and the other merely "nominal." Among other things it was said: "It is argued that nominal value and par value are synonymous terms in the commercial vocabulary, and that the par value of the stock of this company is one million dollars, because that is the amount of its nominal or authorized capital. If this is so, the par value has not been affected by the payment of the calls upon the subscriptions heretofore and will not be hereafter. Whether the amount paid is ten per cent or fifty, or one hundred per cent of the authorized capital, the par value must, according to this doctrine, remain the same. This overlooks the meaning of the word value, and the basis on which the idea of value rests. The par value of a treasury note or bank bill is the sum named on its face, because the holder can demand and is entitled to receive that sum for it (from the issuer). When it cannot be so exchanged it is said to be below par. But a certificate of stock is not a negotiable instrument. It stands in the hands of the subscriber for an amount equal to and no more than the amount actually paid upon it.

"How then is the equivalent, the par, in value of the stock in the hands of the holder to be ascertained at any given time? Very clearly by the books of the company, which show for what value it stands, what value it represents at that time." Some of these remarks seem a little peculiar perhaps, although the conclusion was the only reasonable one at which to arrive. It was reached, however, by brushing aside what certainly was the par value as generally understood and adopting an arbitrary one based upon the amount actually paid into the company.

This was the court's answer to an attempt by a corporation to make an empty phrase the substantial basis for undertaking a very substantial liability and so defeating the object of an entirely reasonable statute. But courts have also disregarded it when

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2. *Commonwealth v. Lehigh Ave. Ry. Co.*, 129 Pa. St. 405.

adherence to it might have embarrassed the corporation itself. This appears in a modification of the rule formerly held by many state courts and declared by the Supreme Court of the United States,<sup>3</sup> that the shares of a corporation could not be originally sold and distributed for less than their par value either in money or property.<sup>4</sup> Thus in *Handley v. Stutz*<sup>5</sup> a coal company "capitalized" at \$200,000 and with \$120,000 of the stock outstanding became obliged to raise \$50,000 in order to continue business. The issued shares were of course greatly depreciated and, naturally, no one could be found to give "full" value for the unissued. Finally bonds to the amount of the required sum, although not marketable by themselves at their principal value, were sold by giving an equal amount of the previously unissued stock as a bonus. The \$30,000 of stock still remaining was then distributed among the old stockholders as a present. In a creditor's bill to compel payment to the corporation of the par value of the new stock in cash, the court declared that under such circumstances the old stockholders who had received the new shares without any consideration whatever would be liable for "the value." But as to the stock delivered with the bonds it was held that "an active corporation may, for the purpose of paying its debts and obtaining money for the successful prosecution of its business, issue the stock and dispose of it for the best price that can be obtained."<sup>6</sup>

To repeat, in the Pennsylvania case the court refused to allow the corporation to take advantage of an absurdity when it would work injustice to others. In the Federal case, the decision was that the corporation would not be held to this fiction when the course would embarrass the company itself. The cases thus supplement one another.

One hesitates in this era of unrestrained language, to express unduly harsh judgments, but it seems as though the chief attraction of the habit of creating apparently definite values were the unusual opportunities it affords to mislead. Like "collateral trust bonds" which induce stockholders to part with voting privileges and the benefit of possibly increased dividends in exchange for a fancied greater security, or second mortgages masquerad-

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3. *Upton v. Tribilcock*, 91 U. S. 45.

4. Thompson, Comment on Corporations, Preface VII.

5. 139 U. S. 417.

6. In *Rickerson, etc., Co. v. Farrell, etc., Co.* (75 Fed. Rep. 554), this doctrine was limited to the payment of existing debts, having no application when the object was merely to extend the business. Of course this means simply that the Court dislikes to disregard tradition unless there is a necessity for so doing. There is certainly no logic in the distinction.

ing as "consolidated" or "general" liens, the suggestion of more worth than exists in reality is made. "The least intelligent investor" observed a well-informed writer, "may be greatly deceived by the mere nominal figure of capitalization itself. To him a million dollars of stock must somehow represent a million dollars of value. Figures of cost and earnings he has not scrutinized closely. Indeed all investors are influenced to some extent by this superficial figure."<sup>7</sup>

When a corporation is reorganized, tables are published in which the par value of the new stock and the principal value of the new bonds to be issued in the exchange for each unit of old securities are added together, to make as brilliant an appearance as possible and induce the holders to "come in." Thus they sometimes seem to be getting much more than they had before. And it is certainly not unusual for one company owing stock of another, to carry the securities at the face value of the certificates upon its books and so exhibit a prodigious total of assets, although they might be almost, if not quite, unmarketable. "Watered stock" under present circumstances, does not seem from a superficial view to be so much a mere lessening in value of all the other shares, as an expansion of the corporation. A "ten million dollar" company is much more imposing than one with one hundred thousand dollars of capital, however shrunk the assets of the one may be or however great those of the smaller.

A proposal for the discontinuance of this deceptive and unnecessary practice was made in a recent illuminating address before the New Hampshire Bar Association.<sup>8</sup> "I would not" the speaker is reported to have said, "have the law require for the shares any money denomination, that is to say, any par value. Why should the par value of each share be prescribed? What purpose do these statements in the instrument of incorporation serve? Do they not lead very commonly to fictitious capitalization, to statements by corporations and by those who promote them that are misleading, to an unreasonable and sometimes an oppressive or even dangerous effort in the result to justify a capitalization which originally was unjustified? Do they not oftentimes lead to absurd and even immoral discrepancies, between the nominal money valuations made for purposes of public taxation? If our system of corporate capitaliza-

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7. E. D. Durand "Stocks Watering," *Independent*, Sept. 18, 1902.

8. Mr. E. M. Shepard of the New York Bar. See *N. Y. Evening Post*, Tuesday, October 2, 1906.

tion produces as I think it does, these and other evils, is it nevertheless necessary? Does it serve any purpose except to facilitate operations of promoters and of bankers which serve no good purpose to the community?"

This seems to be eminently sound. But why should we not go a step further and prohibit corporations from giving any apparent value to their shares instead of merely permitting them to refrain from so doing? Let every company, for instance, set forth in its charter, instead of the arbitrary "capitalization," a statement of all property it has received or will receive and the number of shares it is proposed to issue. Each one would then represent, without any obscurity, a proportionate interest only in the net assets of the corporation.

It is always difficult to prophesy with accuracy what practical effect will be produced by new methods. But it seems reasonable to suppose that the change suggested, apart from conforming to the simple truth and preventing much misconception, would have some positive and beneficial results. Thus it would at least tend to lessen the absenteeism that is so conspicuous now in corporate management. What does the average stockholder know about his company? So long as he seems to have a definite financial interest, he is content with the knowledge that it is "doing well," that certain able men are guiding its operations and that dividends are received regularly. If it were brought home to him that his interest was an indeterminate one, obviously dependent upon the varying fortunes of the corporation, he would be far more apt to follow its operations in detail and request periodical statements. And this would probably result in a publicity that is not vouchsafed, but which is certainly one of the most legitimate of present day demands.

The only real objections to the proposal are of detail, so far as is apparent. It would be quite as easy to pay dividends at so many dollars a share as upon a percentage basis. And if it seem necessary or desirable to continue the division into classes of preferred and common stock, the preference of the former in the distribution of assets could be placed at any reasonable figure.

Radical changes, of course, should be brought about slowly, and only after prolonged discussion, so that any disturbance or confusion would be reduced as much as possible. It seems unfortunate, however, that the invaluable corporate mechanism should be permitted to accumulate and preserve barnacles that engender suspicion without serving a useful purpose. At least one may hope that this subject will receive greater attention in the future than has been accorded it in the past.

*Frederick Dwight,  
of the New York Bar.*

## DEVELOPMENT OF THE COMMERCE CLAUSE OF THE CONSTITUTION.

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A constitution is a living instrument. Framed at the beginning of a nation its purpose is to provide a national rule of action for all time and through every stage of the nation's development. The makers of a constitution may have in their minds particular applications of the language used, but no such limitations attach to the words themselves. The language may, in the course of events, become applicable to conditions beyond the imagination of those who adopted it. The framers of a constitution, of all men, may build better than they know.

The words of a written constitution are changeless, but their meaning is not always the same. In the light of experience words possess new meanings in men's minds. History interprets constitutional provisions. The crisis of a nation make things clear which were in doubt before. The rule that in the interpretation of written instruments the object is to ascertain the intention of the makers is not, therefore, wholly controlling in the construction of constitutional provisions. The purpose of the framers of a constitution may properly be considered as an element in its interpretation, but the practical application of its provisions must always be determined in view of changed economic conditions and of the fundamental principle that a constitution, whenever framed, is always a *present* rule of national life.

The principle of constitutional evolution through interpretation is most strikingly illustrated in the case of the commerce clause of the Constitution of the United States. The federal commercial power—the essentially nationalizing power—has been brought out through the interpretation of the commerce clause, in the light of history and the nation's growth, by the Supreme Court of the United States. The series of decisions marking that development mark, also, American commercial progress and furnish the most enduring monuments of the greatness of the tribunal which rendered them.

An examination of the history of the times prior to the adoption of the Constitution shows that the regulation of foreign commerce was demanded by the exigencies of the Union. The Articles of Confederation reserved to the states the right to levy duties, except

such as might interfere with stipulations in the treaties with France and Spain. The commerce of the country was under the control of the state legislatures. It was the commerce of thirteen states and not of a single nation. Diverse regulations caused confusion and clashing. The preservation of American shipping required the adoption of a navigation act. The existence of the United States as a commercial power made necessary a central authority to control intercourse with all the states. The financial difficulties of the Confederation showed plainly the necessity for a national means of raising national revenue. The Confederation was a government with power to incur obligations, but without power to discharge them. National debts were parcelled out among the states and thirteen independent legislatures granted or withheld the means of payment. The credit of the nation demanded that a national revenue should be provided, and a tariff on imported goods furnished a readily available method of raising it.

At the time of the adoption of the Constitution commerce among the states existed only in a small way. The states lay along the seaboard and the principal means of communication was by sailing vessels. Stage coaches, wagons and pack-horses furnished the means of inland transportation. There were few manufactories, and those which existed usually supplied only the markets in their immediate vicinity. The necessities were produced at home. The luxuries were brought from abroad. The slight interstate trade that existed, moreover, was impeded by the imposition of duties by the different states upon the traffic across their borders. The levying of imposts by the states upon goods brought in from other states was an easy means of raising revenue—a means appealing alike to selfishness and local prejudice. That such imposition could only result in rivalry between the states and the elimination of all common interests was generally acknowledged and the necessity for their abolition was generally felt. But there is no indication in the history of the times nor in the debates in the Constitutional Convention that any other or further regulation of interstate commerce was contemplated.

The Convention met and framed a Constitution containing this provision: "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states and with the Indian tribes." By the adoption of this clause in its grant of legislative powers the Constitutional Convention created the federal commercial power and provided for unity of commercial regulation.

The adoption of the commerce clause marked an epoch—the beginning of the development of commercial supremacy from commercial chaos. And yet no member of the Convention appreciated the possibilities of the language used. There is nothing to indicate that anything further was intended than the uniform regulation of foreign commerce and the prevention of imposts at state lines. Certainly the people had in mind foreign commerce when they bore the ship “Federal Constitution” with colors flying, as the central figure of the pageants in honor of the ratification of the Constitution.

But while the purpose of the framers of the Constitution in respect of interstate commerce was limited in its scope the language used was broad and comprehensive and has become applicable to conditions incomparably changed. The growth of the nation in territory and population has only kept pace with mechanical and scientific development in furnishing means of transportation. Foreign commerce is now insignificant when compared with interstate commerce. The amount of merchandise transported across state lines is stupendous. The power conferred upon Congress to regulate this commerce among the states—to control transportation and intercourse—is among the great powers of the federal government. As a nationalizing power—a power which works towards one nation instead of a collection of states—it is the most important power of all. Power in the general government to regulate *foreign* commerce is essential to the standing of the United States as one of the commercial powers of the world. Power to regulate *interstate* commerce is essential to the upbuilding of a great nation.

And the development of the federal commercial power has resulted from the definitions of two words. The Constitution grants to Congress power to “regulate commerce.” As already shown, a narrow meaning given to those words would have been in accordance with the intention of the framers of the Constitution, as that intention may be gathered from the history of the times. Neither the word “commerce” nor the word “regulate” is a word of precise meaning, and it was necessarily left to the Supreme Court, by defining the words, to broaden or limit the power. The widening scope of the commerce clause has followed from the broadening definitions of the words, “commerce” and “regulate.”

The word “commerce” might have been defined, in the language of the dictionary, as “an exchange of merchandise between different places,” and as an equivalent for “trade;” and the purpose of the Constitutional Convention, in providing for national duties on imports and preventing imposts at state lines, would have been fully



met. Moreover, the regulation of trade with foreign countries has never required that the word "commerce" should receive a broad definition. On the other hand, the existence of an effective federal power in respect of interstate commerce does require that that term should be held to include, broadly, all commercial intercourse between the states.

The Supreme Court has met the exigencies of the case. It has said that the word "commerce," as used in the commerce clause, "is a term of the largest import" and has given this definition: "Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities." (*Gloucester Ferry Company v. Pennsylvania*, 114 U. S. 203.)

An analysis of this definition shows that interstate commerce includes:

- (1) The transportation of property from one state to another.
- (2) The transportation of persons from one state to another.
- (3) The navigation of public waters for transportation purposes.
- (4) The purchase, sale and exchange of commodities between citizens of different states.

This broad definition of interstate commerce has been the result of gradual growth. In the earliest interstate commerce case, the great case of *Gibbons v. Ogden*, 9 Wheat. 1, it was held that the word commerce comprehended navigation, and that a power to regulate navigation was as expressly conferred as if that term had been added. Extending this doctrine, it is held that navigation involves the control of navigable waters, and necessarily includes the power to keep them open and free from obstruction, and to make improvements in them. This conclusion that the federal government, under the commerce clause, has power to authorize improvements in waters within the limits of a state, is a striking illustration of the principle that history and the nation's necessities may outweigh the intention of the framers of the Constitution.

The word "commerce," upon its face apparently refers to the traffic in commodities; but it is held also to include the transportation of passengers from state to state, their embarkation and disembarkation. Transportation is, however, an essential element of commerce. Without transportation there can be no commerce. Production, therefore, is not commerce. "Manufacture succeeds to commerce and is not a part of it." While the operation of a manu-

facturing establishment necessarily involves the shipment of its product, the process of manufacture is distinct from the process of transportation. The former process is the subject of state regulation; the latter, of federal control. Similarly, banking and insurance do not constitute commerce, because they do not involve the element of transportation.

The broadening power over interstate commerce given to Congress by the decisions is, however, even more clearly shown in the widening definition of the word "regulate" than in the case of the word "commerce." If, as said by President Monroe in a message to Congress, nothing more was intended than to prevent the imposition of duties by states upon goods brought in from other states, the word "regulate" was very limited in its scope. And the circumstances surrounding the adoption of the commerce clause also support the view that the power was intended to be limited and, to a certain extent, concurrent with the powers of the several states. The motion to give Congress the "sole and exclusive" power over commerce was lost in the Constitutional Convention. That the power of Congress was merely concurrent with that of the states and involved no prohibition of state action not inconsistent with federal laws was, moreover, the opinion of the attorney-general immediately after the adoption of the Constitution (Opinion of Edmund Randolph, attorney-general, Feb. 12, 1791), and of different state courts.

It was acknowledged from the beginning that the power of Congress, when exercised, was paramount. The essential question was whether it was exclusive or concurrent. This question was first answered in *Gibbons v. Ogden*, *supra*, in which Chief Justice Marshall said that the federal commercial power was indivisible and therefore exclusive of a like power in a co-ordinate sovereignty. The underlying principle is, that the power to regulate being the power to restrain, the grant of power to regulate necessarily implies power to determine what shall remain unrestrained. Inaction by Congress is equivalent to an affirmative declaration that no action is desired. Accordingly, while the decision in *Gibbons v. Ogden* has not always been followed, it is now well settled by the Supreme Court of the United States that, with respect to all subjects national in character and admitting uniformity of regulation, the federal commercial power is not only paramount, but exclusive.

Interstate commerce, consisting of the sale, exchange and transportation of commodities and the transportation of persons manifestly admits of uniform regulation, and is subject solely to the control of Congress. The states are without power to impose any burdens upon such commerce, or to interfere with it in any way. It is

only in the case of local matters—in matters which are rather auxiliary to commerce than a part of it—that the states have power to act in the absence of action by Congress.

The Supreme Court has many times said that the power to regulate commerce is to prescribe the rule by which it is to be governed. But this observation must always be read in the light of the likewise often repeated statement of the court that the power of Congress under the commerce clause is plenary, complete in itself and subject to no limitations other than those to be found in the Constitution. A wide discretion is left to Congress in exercising the power conferred. It may go further than to determine the manner in which the various kinds of commerce shall be carried on. As held by the Supreme Court in the *Lottery Case*, 188 U. S. 321, legislation under the commerce clause may sometimes assume the form and have the effect of prohibition. How far this doctrine will be carried—whether, for example, a statute prohibiting monopolistic corporations from engaging in interstate commerce would be held to be a legitimate exercise of the power of Congress—remains to be seen.

While Congress was granted by the Constitution plenary power over interstate commerce it practically failed to exercise it for a hundred years. The development of the federal power which we have noted was rather in a negative than in a positive way. The Supreme Court was called upon to say what the states could not do instead of what Congress could do—except as the one necessarily followed from the other. It was in determining the constitutionality of state legislation that the great principles which we have outlined were laid down. In 1887, however, Congress passed the Interstate Commerce Act, and, in 1890, the Sherman Anti-Trust Act. Both of these measures are of great and increasing importance. In the one, as amended, a comprehensive system for the control of carriers engaged in interstate commerce is stated, and in the other all combinations in restraint of such commerce are prohibited.

We have thus traced the outline of the development of the federal commercial power. And the end is not yet. The tendency in this country toward a centralization of power is increasing. The field of the national government is constantly widening. The nation is dealing more and more with problems formerly thought to belong exclusively to the states. A unity is growing out of a union. And the primary source of all this nationalizing power is the commerce clause of the Constitution.

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## THE SUPREME COURT OF THE UNITED STATES.

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Public attention is directed to the Supreme Court of the United States just now because Mr. Justice Henry G. Brown, after a long and honorable career on the bench,<sup>1</sup> has resigned, largely because of failing eyesight,<sup>2</sup> and a successor to take the place vacated by him in the Supreme Court is to be appointed. As the general public knows altogether too little about the Supreme Court, now would seem to be a good time to become better acquainted with its history, functions and method of dispatching business.

Under the old Articles of Confederation, there was no separate Supreme Court provided for the federated states, but to Congress fell nearly all the judicial as well as all the executive and legislative powers intrusted to the government.<sup>3</sup> The Congress of the Confederation did, to be sure, establish in 1780 "The Court of Appeals in Cases of Capture,"<sup>4</sup> but that court had simply to do with disputes over vessels captured during the war on the high seas. There was no other separate court, except that certain of the justices of the highest courts and of the courts of admiralty of the different states were designated by ordinance to hear and try persons charged with piracies and felonies on the high seas.<sup>5</sup> All other cases—mainly disputes between states as to boundaries and between individuals and states as to land grants—were tried before Congress. The litigation was small—even the Court of Appeals in cases of capture disposing of but 118 cases,<sup>6</sup>—but there was just enough of it to awaken the minds of our forefathers to the need of a genuine Supreme Court.

The lack of a separate judiciary "constituted one of the vital defects of the confederation. Where there is no judicial department to interpret, pronounce and execute the law, to decide controversies and to enforce rights, the government must either perish by its own imbecility or the other departments of government must usurp powers for the purpose of commanding obedience, to the

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1. Fifteen years as United States district judge and about the same length of time as associate justice of the United States Supreme Court.

2. 18 Green Bag, 330.

3. Articles of Confederation, Art. IX.

4. Carson, *Supreme Court of the United States*, p. 55.

5. *Ibid.*, p. 65.

6. *Ibid.*, p. 61.

destruction of liberty."<sup>7</sup> That lack was remedied by the constitutional convention of 1787, which inserted this provision in Art. III of the Constitution of the United States:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges both of the Supreme and inferior courts shall hold their offices during good behavior and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office."

Then the article went on to define the jurisdiction of the courts, that is, what cases should come before them, giving to the Supreme Court original jurisdiction, that is, the right to have suits begun in the Supreme Court, "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party," but appellate jurisdiction only, that is, the right to determine matters only on appeal or error after trial in an inferior court, as to all other cases to which the judicial power of the United States extends.<sup>8</sup> The original jurisdiction is beyond interference by Congress,<sup>9</sup> but the appellate jurisdiction is expressly stated to be "with such exceptions and under such regulations as the Congress may make."<sup>10</sup>

Under the Constitution, Congress had to determine how many justices of the Supreme Court to have, what inferior courts to create, what salaries to pay, what appellate jurisdiction the Supreme Court should have, how cases should be brought to the Supreme Court, and in general to put the whole judicial machinery in motion. This matter was one of the first to engage the attention of Congress and under the Act of Congress of September 24, 1789, the courts

7. II Story on the Constitution, 5th ed., Sec. 1574. See also the following remarks of the late Justice Field at the Centenary Celebration of the United States Supreme Court in 1890: "The growing defect in the government under the Articles of Confederation was the absence of any judicial power; it had no tribunal to expound and enforce its laws."

"In no one particular was the difference between that government and the one which superseded it more marked than in its judicial department. . . . No government is suited to a free people where a judicial department does not exist with power to decide all judicial questions arising upon its constitution and laws." 24 Am. Law Rev. 358-9.

8. Art. III, Sec. 2, United States Constitution.

9. "And it is upon the principle of the perfect independence of this court that in cases where the Constitution gives it original jurisdiction the action of Congress has not been deemed necessary to regulate its exercise or to prescribe the process to be used to bring the parties before the Court or to carry its judgment into execution." Taney, C.J., in *Gordon v. U. S.*, 117 U. S. 697, 701.

10. U. S. Const., Art. III, Sec. 2.

were organized.<sup>11</sup> The details of that act are unimportant here, except that the Supreme Court was to consist of a chief justice and five associate justices, it taking four out of the six justices to constitute a quorum and was to hold two terms of court a year, one commencing the first Monday of February and the other the first Monday of August.<sup>12</sup>

Under the Act of September 24, 1789, the Supreme Court of the United States organized in New York city, then the seat of the federal government with John Jay as chief justice. As there was not a quorum, February 1, 1790, the court did not sit until February 2.<sup>13</sup> The grand jury for the United States celebrated the day of the first sitting by giving a dinner to the justices.<sup>14</sup> That dinner was the chief business transacted by the court, which, without having a single case come before it, adjourned until August.<sup>15</sup>

The business done by the court was for a number of years insignificant. "From 1790 to 1800, only six cases were decided in which were involved questions of constitutional law. Marshall, upon his elevation to the Supreme bench (in 1801) found only ten cases awaiting adjudication."<sup>16</sup> There was so little business that the chief justice varied his duties by running for governor of New York in 1792, by spending a large part of a year negotiating with Great Britain what is known as Jay's treaty of November 19, 1794, and finally in 1795 resigned as chief justice to become governor of New York. It was not indeed until after John Marshall became chief

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11. 1 Stats. at Large, 73. "In the last judicial paper from the pen of Chief Justice Taney," the Chief Justice says, "the Supreme Court does not owe its existence or its powers to the legislative department of the government. It is created by the Constitution and represents one of the three great divisions of power in the government of the United States, to each of which the Constitution has assigned its appropriate duties and powers, and made each independent of the other in performing its appropriate functions. . . . The existence of this Court is as essential to the organization of the government established by the Constitution as the election of the President or members of Congress. It is a tribunal which is ultimately to decide all judicial questions confided to the government of the United States. No appeal is given from its decision, nor any power given to the legislative or executive departments to interfere with its judgments or process of execution. The position and rank, therefore, assigned to this Court in the government of the United States differ from that of the highest judicial power of England, which is subordinate to the legislative power, and bound to obey any law that Parliament may pass, although it may, in the opinion of the Court, be in conflict with the principles of *Magna Charta* or the Petition of Rights." 117 U. S. 697, 699-700.

12. Under the present act the Supreme Court holds only one term, beginning the second Monday in October, and lasting until May or June. The present term will be known while it lasts as October Term, 1906.

13. Carson, *Supreme Court of the United States*, p. 150.

14. *Ibid.*, p. 151.

15. *Ibid.*, p. 152.

16. Willoughby *Supreme Court of the United States*, p. 85.

justice that the court was even respected. It had previously made itself unpopular by holding that it had jurisdiction to entertain suits by a private citizen of one State against another State.<sup>17</sup> A decision which resulted in the Eleventh Amendment to the United States Constitution.

Certain facts attendant upon Marshall's appointment as chief justice are of sufficient importance to dwell upon. When it was seen that Jefferson had been elected president of the United States the federalists determined to fill all the offices they could, so that Jefferson would have as few as possible to fill. Marshall's appointment as chief justice was proper enough—he took his seat in the court February 4, 1801, at the very first session of the court ever held in Washington—but it was followed so closely by the Act of February 13, 1801,<sup>18</sup> creating a number of new federal courts, and by President Adams' so-called "midnight" appointment in which Marshall who, though chief justice, continued to act as Secretary of State until Adams' term ended, took part, that it is not strange that Jefferson felt bitter against Marshall.<sup>19</sup> The Act of February 13, 1801, gave additional cause for bitterness because, further to tie Jefferson's hands as to judicial appointments, it provided that after the next vacancy in the Supreme Court the court should consist of only five justices, one chief justice and four associate justices. The Act of February 13, 1801, was repealed by the Act of March 8, 1802,<sup>20</sup> and the Supreme Court continued to consist of six justices till the Act of 1807 increased the number to seven; but the Act of April 29, 1802,<sup>21</sup> suspended the session of the United States Supreme Court until February, 1803, by cutting out the August term for 1802 after the February term had been adjourned. That suspension of the Supreme Court, growing out of the ill-feeling of the time, is one of the significant things in the court's history.

Immediately upon the resumption of the sessions of the Supreme Court came the decision of *Marbury v. Madison*,<sup>22</sup> where Marshall

17. *Chisholm v. Georgia*, 2 Dall. (U. S.) 419.

18. 2 Stats. at Large, 80.

19. Marshall seems to have signed commissions as Secretary of State till the very moment when Jefferson's term began. Morse's *Jefferson*, p. 209. If he did so, Jefferson's bitterness is fully explained.

20. 2 Stats. at Large, p. 132.

21. 2 Stats. at Large, p. 156.

22. 1 Cranch, 137. Carson suggests that Marshall's way of dealing in *Marbury v. Madison* was due in part to the fact that he "smarted under a sense of wrong growing out of the suspension of the sessions of the Supreme Court by legislative artifices." Carson, *Supreme Court of United States*, p. 206. It may well be that he wanted to serve notice on Jefferson that such suspension was illegal and while tolerated in the one instance would not be allowed to be carried to an extreme.

first announced the doctrine that the Supreme Court could declare an act of Congress to be unconstitutional. The era of constitutional decisions by Marshall had begun.

It is not the purpose of this paper to deal with the constitutional or other decisions of the Supreme Court of the United States. But the political character acquired by the court as a result of those decisions needs emphasis.

From the time of *Marbury v. Madison* the Supreme Court of the United States has stood as the conservator of the United States Constitution. Whether rightly or wrongly the court has affirmed the right to declare null and void all laws, state as well as national, which it regards as clearly inconsistent with the federal constitution. It is this right to declare laws unconstitutional which caused Sir Henry Maine to write that "the Supreme Court of the United States is not only a most interesting but a virtually unique creation of the founders of the Constitution,"<sup>23</sup> and that "the success of this experiment has blinded men in its novelty. There is no exact precedent for it either in the ancient or in the modern world."<sup>24</sup> As De Tocqueville points out "whenever a law which the judge holds to be unconstitutional is argued in a tribunal of the United States, he may refuse to admit it as a rule; this power is the only one which is peculiar to the American magistrate, but it gives rise to immense political influence."<sup>25</sup> What keeps the political influence of the Supreme Court from being so apparent is that the court never passes upon the constitutionality of a statute except in an actual case pending before it. In 1793, during the controversy with the French Minister Genet, over the right claimed by him to refit as a privateer at an American port a captured English ship, President Washington, by the advice of his cabinet, asked the United States Supreme Court justices questions about the true interpretation of the treaties with France, but the justices declined to answer on the ground that they could decide only questions growing out of some case actually before them.<sup>26</sup> That early stand of the Supreme Court of the United States, ever since adhered to by that court, has been the means of keeping the Supreme Court an essentially judicial and

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23. Maine's popular Government (Henry Holt & Co., 1886 ed.) p. 217. See Hannis Taylor's heading "Supreme Court of the United States has no prototype in history." Taylor's Jurisdiction and Procedure of the United States Supreme Court, Sec. 1.

24. Maine's Popular Government, p. 218.

25. De Tocqueville, Democracy in America (Longmans, Green & Co., 1889, ed.) Vol. I, p. 94.

26. Marshall's Life of Washington, V, 433, 441; Baldwin's American Judiciary, pp. 32-3.



only indirectly a political body. Because an American judge cannot attack legislation openly and directly, but must wait for a case to be brought before him to attack it, and because when a case calling for a law to be declared unconstitutional, comes before him, he cannot refuse to decide it,<sup>27</sup> the political effect of his decision is regarded by the public as accidental and the judicial nature of his work thus obscures the political.<sup>28</sup>

But the Supreme Court of the United States shares this kind of uniqueness with the other federal courts and with the state courts.<sup>29</sup> The state courts may declare laws to be unconstitutional, not only because they violate the state constitutions, but also because they are inconsistent with the federal Constitution. The latter document is "the supreme law of the land and the judges in every State shall be bound thereby."<sup>30</sup> The state courts, therefore, perform this political work; but as to the federal Constitution, the Supreme Court of the United States is the final arbiter.

27. The American judge "is brought into the political arena independently of his own will. He only judges the law because he is obliged to judge a case. The political question which he is called upon to resolve is connected with the interest of the suitors and he cannot refuse to decide it without abdicating the duties of his post." De Tocqueville's *Democracy in America*, Vol. I, p. 99.

28. "The success of the Supreme Court of the United States largely results from its following this mode of deciding questions of constitutionality and unconstitutionality. The process is slower, but it is freer from suspicions of pressure and much less provocative of jealousy than the submission of broad and emergent political propositions to a judicial body; and this submission is what an European foreigner thinks of when he contemplates a court of justice deciding on alleged violations of a constitutional rule or principle." Maine's *Popular Government*, 223-4.

29. The United States Supreme Court does have some features peculiarly its own, however. Under the Judiciary Act it is given authority to review and set aside any decision of the highest court of a state which, in its judgment, infringes the Constitution, laws and treaties of the United States. United States Rev. Stats., Sec. 709. Moreover, having original jurisdiction of controversies to which a state is a party, the Supreme Court of the United States may summon a sovereign state of the union before its bar. The exercise of these powers over states by the United States Supreme Court, so astonishing to foreigners, has become an everyday affair with us.

30. U. S. Const., Art. VI. "And here it is appropriate to say that the duty of expounding the Constitution of the United States has not devolved alone upon the courts of the Union. From the organization of our government to the present time that duty has been shared by the courts of the states. Congress has taken care to provide that the original jurisdiction of the courts of the Union of suits at law and in equity arising under the Constitution and laws of the United States or under treaties with foreign countries shall be concurrent with that of the courts of the several states. This feature of our judicial system has had much to do with creating and perpetuating the feeling that the government of the United States is not a foreign government, but a government of the people of all the states, ordained by them to accomplish objects pertaining to the whole country, which could not be efficiently achieved by any government except one deriving its authority from all the people." Mr. Justice Harlan in Carson's *United States Supreme Court*, p. 723.

Before we leave the political nature of the Supreme Court, a word should be said about the service of some of the justices of that court on the Hayes-Tilden electoral commission. That commission consisted of five members chosen by the United States Senate, five members chosen by the National House of Representatives, and five justices of the Supreme Court of the United States. The result was a bad thing for the Supreme Court. As Mr. Woodrow Wilson points out: "Unfortunately, however, every vote of the commission was a vote upon partisan lines. It contained eight republican and seven democratic members, and in each case all disputed questions were decided in favor of the republicans by a vote of eight to seven. . . . Even the members of the Supreme Court had voted as partisans."<sup>31</sup>

Because of the political nature of the United States Supreme Court, a word is necessary about the appointment of justices. The appointments to the Supreme Court of the United States have naturally been made along party lines, though in 1893 President Harrison, a republican, appointed Howell E. Jackson, a democrat, as associate justice of that court. Mr. Justice Jackson was an able judge,<sup>32</sup> but the precedent set by his appointment will seldom, if ever, be followed. The appointees of that court hold for life, the design of the framers of the Constitution being thereby to render them independent of the legislative and executive departments,<sup>33</sup> and the political power of the Supreme Court is far too great and too certain to be called upon during the life term of an appointee for presidents to be willing to appoint justices of opposite political faith to their own. It must not be supposed, however, that a Supreme Court justice remains a deliberate or even an extreme partisan on the bench. To the layman it is hardly comprehensible, but to the lawyer it is perfectly obvious that the ermine tempers the man.<sup>34</sup> It has been truly

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31. Wilson's *Division and Reunion*, 1829-1889, pp. 285-6.

32. See Mr. Justice Harlan's appreciative remark in 30 *Am. Law Rev.* 902.

33. Hamilton in the *Federalist* (Lodge's edition) No. LXXVIII, p. 483; Bryce's *American Commonwealth*, Vol. I, p. 229-30.

34. The most conspicuous instance of non-partisanship on the bench was that of Chief Justice Salmon P. Chase. He had been a strong political partisan and stepped from the cabinet to the chief justiceship; but "from the first moment he drew the judicial robes around him, he viewed all questions submitted to him as a judge in the calm atmosphere of the bench and with the deliberate consideration of one who feels that he is determining issues for the remote and unknown future of a great people." (Mr. Justice Clifford in 16 *Wall*, p. 15). It fell to his lot to review as judge his acts as Secretary of the Treasury in issuing legal tender paper money and to insist in the capacity of judge that his acts in the capacity of Secretary of the Treasury were wrong; and he maintained his insistence, although the Supreme Court, after the appointment of Justices Bradley and Strong, differed from him. Though we now think that he was right as Secretary of the Treasury and

fortunate for the country that since the time of Marshall an appointment to the Supreme Court of the United States has always been regarded as an ultimate ambition by appointees, for that has made it possible for us to say of the court that the hope of personal political preferment has never shaped one of its decisions. But while the judicial ermine ennobles the man it covers, the fact remains that the era of Marshall in the Supreme Court was of a different tenor from that of Taney and that of Taney of a different tenor from the period during which Chase, Waite and Fuller have successively presided over the court, the differences being explainable only by the political proclivities of the justices of each period. It goes without saying that "in none of these three periods can the judges be charged with any prostitution of their functions to party purposes. Their actions flowed naturally from the habits of thought they had formed before their accession to the bench, and from the sympathy they could not but feel with the doctrines in whose behalf they had contended."<sup>55</sup> Yet the general result is decidedly unfavorable, and properly so, to the appointment of justices from other than the party in power.<sup>56</sup> What a president should try to do is to get the ablest judicial minds of his own party, and while precedent enables him, if he chooses, to take his appointees from his own cabinet, his choice should be so governed as not to impair the confidence of the people in the reasonable impartiality of the court. Of late years, there has been no danger of any president neglecting this duty.<sup>57</sup>

The business of the Supreme Court of the United States was light down to the Civil War. During the first few years of Marshall's term there were only twenty-four cases a year. From 1826 to 1830 the cases averaged about fifty-eight a year. "In 1836 when Roger B. Taney succeeded Marshall as chief justice the number was only thirty-seven. From 1830 to 1850, the increase was also very gradual. Within the five years ending with 1850 the number of

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wrong as judge, all must admire and honor him for that high ideal of judicial duty which forced him to condemn his own previous acts, even though the majority of the court of which he was a member ultimately approved those acts.

35. Bryce's *American Commonwealth*, Vol. I, p. 274-5.

36. Judge Simeon E. Baldwin in writing of the Hayes-Tilden episode says: "The country could not fail to see that judges, as well as other public men, may be insensibly influenced by their political affiliations and regarded the whole matter as a new proof of the wisdom of separating the judiciary from any unjudicial participation in the decision of political issues." Baldwin's *American Judiciary*, p. 51.

37. Only once has an attempt been made to impeach a justice of the Supreme Court of the United States, and that attempt—the impeachment of Justice Samuel Chase in 1804—resulted in an acquittal.

appeals brought into the court, including those docketed and dismissed without argument, was three hundred and fifty-seven, or an average of seventy-one each year. The court was then able to dispose of its entire docket during a session of three months."<sup>38</sup> It is doubtless well for the country that in the formative period of our constitutional law the justices had plenty of time to weigh their decisions carefully. After the Civil War the business of the court was greatly increased and the court finally got so behind in its work<sup>39</sup> that the Act of March 3, 1891,<sup>40</sup> was passed creating the United States Circuit Courts of Appeals with final jurisdiction on appeal and error in certain cases.<sup>41</sup> Since then the Supreme Court has kept pretty well up with its docket.<sup>42</sup>

Though the business of the court was small at the time, the number of the justices of the Supreme Court was raised in 1807 from six to seven<sup>43</sup> and in 1837 from seven to nine.<sup>44</sup> Nine the number remained until by the Act of March 3, 1863, it was increased to ten.<sup>45</sup> But the Act of July 23, 1866,<sup>46</sup> passed to prevent President Johnson from making objectionable appointments, provided that no vacancies in the Supreme Court should be filled until the number of associate justices should be reduced to six and thereafter the court should consist of a chief justice and six associate justices. When President Johnson had been succeeded by President Grant the Act

38. "The Needs of the Supreme Court" by Mr. Justice Strong, 132 No. Am. Rev. 437.

39. In October, 1890 term, the Court had 1816 cases on its docket and disposed of 617 (See 140 U. S. Appendix). In October, 1891 term, the new appellate cases were reduced by the new act, so that the Court had only 1582 cases on its docket and it disposed of 496 of those (See 145 U. S. Appendix). In those days it took three years to reach a case for argument.

40. 26 Stats. at Large, 826.

41. Since the creation of the Circuit Courts of Appeal the Supreme Court has jurisdiction of appeals from the Circuit or District Courts only in the following cases: "In any case in which the jurisdiction of the Court is in issue.

From the final sentences and decrees in prize causes. In cases of conviction of a capital crime. In any case that involves the construction or application of the Constitution of the United States. In any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question. In any case in which the constitution or a law of a state is claimed to be in contravention of the Constitution of the United States." 1 U. S. Comp. Stats. (1901) p. 549. In all other cases the appellate jurisdiction is in the Circuit Courts of Appeals.

42. Under date of September 27, 1906, the Clerk of the Supreme Court writes: "At the last term there were 768 cases on the docket of this Court, of which 463 were disposed of, leaving 305 at the adjournment of the Court in May last; 104 cases have been filed since, making a total of 409 cases on the docket to-day for the October term, 1906."

43. 2 Stats. at Large, 421.

44. Act of March 3, 1837, 5 Stats. at Large, 176.

45. 12 Stats. at Large, 794.

46. 14 Stats. at Large, 209.

of April 10, 1869,<sup>46</sup> increased the number again to nine, any six to constitute a quorum. Nine the number still remains.

In this changeable number of the Supreme Court justices lies a great danger. It has often been charged that the appointments made by President Grant under the Act of April 10, 1869, were for the deliberate purpose of assuring a decision upholding the Civil War issue of legal tender paper money.<sup>47</sup> What the real facts are will probably never be known and every historian ought to do what the lawyer necessarily does, and that is, give President Grant and the Supreme Court the benefit of the doubt. That Justices Bradley and Strong, President Grant's appointees, men of unquestioned ability, decided the way they believed cannot be denied, and if President Grant selected them because he knew they would decide as they did and without pre-arrangement of any kind with them, he did what, as executive, he had a perfect right to do. But though we now believe that the Supreme Court of the United States was not "packed," in any objectionable sense of the word, with reference to the legal tender cases,<sup>48</sup> the fact that at any time the number of the Supreme Court justices can be increased and new appointments made for the express purpose of overturning Supreme Court decisions is full of grave import. With that fact must be considered the temporary legislative "suspension" of the sessions of the court in Jefferson's time and the power of Congress to restrict and regulate the appellate jurisdiction of the Supreme Court. The latter power, which has been exercised to save the court from overwork, has also been used to keep the court from considering a *habeas corpus* case,<sup>49</sup> and dur-

46. 16 Stats. at Large, 44.

47. Carson insists (Supreme Court of the United States, p. 449, note 2), that the charge is disproven by showing that the nominations of Justices Strong and Bradley were sent to the Senate on the very day that the original legal tender case—*Hepburn v. Griswold*, 8 Wall. 603—was decided, which was February 7, 1870; but the original report of the case shows that the case was decided in conference November 27, 1869 (8 Wall. 626), and on January 20, 1870, the majority opinion was directed to be read (Ibid), so that if knowledge of the situation had accidentally leaked out, as could well be the case without intentional blame on anybody's part, President Grant might have selected judges whom he knew would favor upholding legal-tender paper money. George S. Boutwell who was Grant's Secretary of the Treasury when the cases were decided states that Chief Justice Chase told him of the conclusion of the Court in *Hepburn v. Griswold* "two weeks in advance of the delivery of the opinion" Boutwell's *Sixty Years in Public Affairs*, Vol. IV, p. 209.

48. Whether earlier judicial appointments and the increase of justices in 1837 were determined upon in the interests of slavery, as Von Holtz intimates, will doubtless never be known. Willoughby, *Supreme Court of the United States*, pp. 96-99.

49. "A man named McArdle of Mississippi obtained a writ of *habeas corpus* from a circuit judge to the military commission trying him. Failing of release, he appealed to the Supreme Court of the United States. The case,

ing the Civil War an attempt was made to "regulate" the appellate jurisdiction by an act requiring the concurrence of two-thirds of the members of the whole court before an act of Congress could be declared invalid.<sup>50</sup> All of these incidents show the extent to which the president and Congress, acting in unison, could tie the hands of the Supreme Court and even through the addition of new justices determine its decisions. It makes the Supreme Court unable to defeat the permanent will of an aroused and reckless people; and renders it possible to see a faint resemblance between the Supreme Court's relation to the other departments of the United States government and the relation of the British House of Lords, which may be overwhelmed at any time by the creation of enough new peers for the purpose, bears to the British House of Commons. Fortunately the American people have never been reckless with reference to the Federal Judiciary. All must agree with Mr. Bryce, however, that the incident of the legal tender decisions "disclosed a weak point in the constitution of the Supreme Court tribunal which may some day prove fatal to its usefulness."<sup>51</sup>

While the Supreme Court of the United States suffered in public estimation from the Dred Scott decision,<sup>52</sup> from the legal tender episode cases,<sup>53</sup> from the Hayes-Tilden Commission incident, and from the income tax case reversal,<sup>54</sup> it is deservedly strong in the estima-

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however, did not reach decision, for Congress, fearing the action of the Court upon the reconstruction governments, the constitutionality of which was involved in the case, passed a law taking away the right of appeal in such cases." (Willoughby *Supreme Court of the United States*, pp. 101-2.) See Act of February 5, 1867, in 14 *Stats. at Large*, 385, providing for appeals in *habeas corpus* cases, the last clause of which reads: "This act shall not apply to the case of any person who is or may be held in the custody of the military authorities of the United States charged with any military offense, or with having aided or abetted rebellion against the government of the United States prior to the passage of this act."

50. Willoughby, *Supreme Court of the United States*, p. 102.

51. Bryce's *Am. Com.*, Vol. I, p. 270. Right here we should notice that the judiciary is necessarily weaker than the legislative and executive departments of the government. Hamilton stated this proposition fully in the *Federalist* (Lodge's Ed. LXVIII, p. 483) and the late Justice Miller of the Supreme Court put it in these words: "The judicial branch of the government . . . has no army, it has no navy and it has no purse. It has no patronage, it has no officers except its clerks and marshalls and the latter are appointed by the President and confirmed by the Senate. They are the officers to whom its processes are sent for the enforcement of its judgments, but they may be removed at any time by the executive. . . . The judges themselves are dependent upon appropriations made by the legislature for the payment of the salaries which support them while engaged in the functions of their office," and he adds: "It must rely upon the confidence and respect of the public for its just weight and influence." Miller on the *Const. of U. S.*, p. 417-18.

52. *Scott v. Sanford*, 19 How. 393.

53. *Hepburn v. Griswold*, 8 Wall. 603; *Knox v. Lee*, 13 Wall. 457.

54. *Pollock v. Trust Co.*, 157 U. S. 429; *Hyde v. Trust Co.*, 158 U. S. 601.

tion of the people of the United States just now and it rests with us to see that it remains so. We must always remember that the only thing which in the time of excitement will stand in the way of a "packing" of the Supreme Court of the United States is the politician's "fear of the people, whose broad good sense and attachment to the great principles of the Constitution may be generally relied on to condemn such a perversion of its form. . . . To the people we come sooner or later; it is upon their wisdom and self-restraint that the stability of the most cunningly devised scheme of government will in the last resort depend."<sup>55</sup>

One of the strongest claims of the United States Supreme Court to public respect and confidence lies in the thoroughness with which it does its work. After every case is submitted, whether with or without argument, each justice goes over the records and briefs. Then, at a conference of the justices, the case is discussed. Following the discussion the roll is called and the justices vote. Following the roll call, the chief justice, without consulting anyone, assigns the writing of the opinion to one of the justices. The latter prepares the opinion and it is privately printed and sent to all of the justices. Each justice scrutinizes it and makes suggestions for changes. All changes not agreed to are considered in conference and voted upon. After all changes are agreed upon and the opinion expresses the final conclusions of the court, it is printed and is announced in the regular way. "When you find an opinion of the court on file and published," says Mr. Justice Harlan, "the profession has the right to take it as expressing the deliberate views of the court based upon a careful examination of the records and briefs by each justice participating in the judgment."<sup>56</sup> Such loose practice as is shown by the early case of *Holliday v. Brown*<sup>57</sup> where the Supreme Court of Nebraska declared that it was bound only by the head notes of its own opinions, would not be tolerated in the United States Supreme Court. Each justice of the United States Supreme Court "examines every case and passes his individual judgment upon it. No case in the Supreme Court is ever referred to any one justice or to several of the justices to decide and report to the others. Every suitor, however humble, is entitled to and receives the judgment of every justice upon his case."<sup>58</sup>

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55. Bryce's Am. Com., Vol. I, 276.

56. 30 Am. Rev. 904.

57. 34 Neb. 232.

58. Mr. Justice Field in Carson's U. S. Supreme Court, p. 713. It may be well to note here that the compensation paid to the Supreme Court justices has been a gradually increasing one. Under the Act of February 12, 1903, (32

While the justices of the Supreme Court of the United States have been painstaking and conscientious, the lawyers that have appeared before them have been of high rank. It was great, but deserved, praise which Mr. Justice Harlan gave those lawyers when he said: "Whatever of honor has come to that court for the manner in which it has discharged the momentous trust committed to it by the Constitution must be shared by the bar of America."<sup>59</sup> This matter is mentioned because there is a growing belief among lawyers that they are falling in public estimation,<sup>60</sup> and it behooves them to see that the courts are not injured thereby. The Supreme Court of the United States is one institution of which we lawyers are justly proud and no injury must come to it through us.

It was in 1895 that Sir Frederick Pollock first suggested in an address at Harvard<sup>61</sup> that some plan be devised whereby the Supreme Court of the United States and the British House of Lords, or the Supreme Court of the United States and the English Privy Council, might co-operate so as to reach the same decision in those matters of general commercial principle in which the Supreme Court of the United States properly declared that "a diversity in the law as administered on the two sides of the Atlantic is greatly to be deprecated." Since Sir Frederick Pollock's suggestion no steps have been taken looking towards its adoption, but much that he had in mind is being accomplished by uniform state law enactments on commercial subjects based on English models. After all, the Supreme Courts of our different states are more concerned with purely judicial questions than is the Supreme Court of the United States, and it is doubtless due to the fact that the United States Supreme Court's main business is deciding questions in American constitutional law with which the English are unconcerned that has kept Sir Frederick Pollock's suggestion from being carried out. When the cry for uniform state legislation has been satisfied, we may recur with enthusiasm to his plan, and may yet find the highest judicial tribunals in the world of English law assisting one another, as he urges that they should, "in matters of great weight and gene-

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U. S. Stats. at Large, p. 825) the associate justices get \$12,500 a year each and the chief justice \$13,000. Any United States judge who has held his commission at least ten years, and has attained the age of seventy years, may resign his office, but continue during the rest of his natural life to draw the same salary which was by law payable to him at the time of his resignation. U. S. Rev. Stats., Sec. 714.

59. Carson's Supreme Court of the U. S., p. 721.

60. See an interesting address by Mr. Edward M. Shepard in 18 Green Bag 601.

61. 29 Amer. Law Rev. 601-3.



ral importance to the common law." Mr. Justice Nelson served on the Alabama Claims Commission; Mr. Justice Harlan was arbitrator in the Behring Sea Dispute; and Mr. Justice Brewer was a member of the Venezuelan Boundary Commission; and it certainly is not too much to hope that some day we shall see justices of the United States Supreme Court, individually if not collectively, exchanging opinions on litigated cases with the highest courts in England, and thus bringing nearer the day of an international judicial tribunal of real dignity and power.

*George P. Costigan, Jr.,  
Lincoln, Nebraska.*

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## INSURANCE POLICIES—IMPLIED WAIVER OF CONDITIONS.

Vance in his work on Insurance, p. 346, says that, "probably no branch of the law presents more hopeless conflict and confusion among the cases that is to be found among those involving questions of waiver and estoppel in insurance law. The objection to allowing the insured to prove by parol that the insurer has waived by a prior oral agreement some material provision of the subsequently issued policy arises, of course out of the fact that it apparently violates the familiar rule that parol contemporaneous evidence is inadmissible to vary or contradict the terms of a written instrument. 1 *Greenl. Ev.* (16th Ed.) Sec. 275. That all prior parol agreements are merged in a subsequent written contract embodying the same subject matter is a rule that is probably universally accepted. Therefore as a consequence of this rule it follows necessarily that any agreement which may have been made between the insured and the insurer prior to the issue of the policy can have no effect upon the rights of the parties unless evidenced by a written instrument. *Wells v. Ins. Co.*, 28 Ind. App. 620. It is equally impossible where this rule is in force to show by parol any facts which would, if they could be shown, estop the insurer from taking advantage of some particular clause in his policy.

In England the cases are clearly opposed to a parol waiver of any of the terms of an insurance policy. *Beggar v. Assurance Co.*, (1902) 71 K. B. 79. In this country there is a conflict of authority although the majority of the State courts undoubtedly favor the

doctrine allowing parol proof of facts contemporaneous with the delivery of the policy constituting an estoppel, whereby the insurer is prevented from obtaining the benefit from a term of his written contract provided that term invalidates the policy in its inception. *Born v. Ins. Co.*, 120 Iowa 299; *Home Ins. Co. v. Mendenhall*, 164 Ill. 458; *Menk v. Ins. Co.*, 76 Cal. 51. Prior to the Northern Assurance Co. Case decided in January, 1902, the United States Supreme Court was also regarded as irrevocably committed to the doctrine enunciated in the case of the *Union Mut. Life Ins. Co. v. Wilkinson*, 13 Wall. 222. In that case the court had held that to permit parol testimony to show that the agent of the company of his own initiative had inserted a false representation in an insurance policy even though the insured had afterward signed the policy, did not contradict the written contract but simply estopped the insurance company from asserting that it was the misrepresentation of the insured. Great was the surprise therefore, when in a decision characterized by obscure reasoning and supported by unsatisfactory authorities the Supreme Court, by a bare majority, completely reversed itself and held that the knowledge of the agent at the time he insured the property that it was also covered by insurance in a second company did not operate as a waiver of a condition in the policy stipulating that the existence of concurrent insurance should avoid the policy unless such waiver should be indorsed on the policy. 183 U. S. 308. Apparently the decision was based on the theory that since the policy provided for a means whereby the terms of the policy could be waived, therefore the agent could not estop the company from setting up the provisions by any parol agreement which he might make. To state that the decision did not meet with approval is almost superfluous. The New York Law Journal characterized it as narrow in spirit and unjust in result. Likewise in the case of *Virginia Fire Ins. Co. v. Mica Co.*, (Va.) 46 S. E. 463, the court said that "while the pronouncements of this great court must always command the highest respect, its judgment in this particular case is deprived of such of its value as a precedent by the circumstances that it is not in harmony with many of its former decisions and that three judges dissented."

Viewing the situation in this light, it should be a source of considerable satisfaction, therefore, that in a recent controversy over the same policy and between the same parties the Supreme Court has in a unanimous opinion clearly obviated the effect of the former ruling and by a more circuitous route practically effected the doctrine laid down in the Wilkinson Case. *Northern Assurance Co. v. Grand View Bldg. Ass'n.*, 27 Sup. Ct. 27, Nov. 1906. In this case the court held, affirming a decision of the Supreme Court of Nebraska, that a suit in equity to reform a policy of fire insurance so that it will express consent to concurrent insurance to recover on the instrument as so reformed, may be maintained after the termination of an unsuccessful action at law to recover on the unreformed contract. Thus although the

court does not admit the doctrine of parol waiver it nevertheless does obviate the harshness of its former ruling by making it possible to the desired end by a suit in equity to reform the policy in accordance with the parol agreement.

In an article in the *Harvard Law Review* for March, 1902, criticising the doctrine laid down in the first decision of the Supreme Court in this case, an attempt was made to justify the doctrine of a parol waiver and to show that it did not violate the parol evidence rule so flagrantly as was supposed. The author argued that a binding contract of insurance is commonly made before the policy is issued; that the policy is merely the reduction of such contract to writing; and that as the limitations upon the agents powers contained in the policy could not affect the contract as previously made it was strained and inequitable to apply the parol evidence rule. The writer seems to have forgotten, however, that the policy must be taken as expressing the final understanding of the parties. *Union Mut. Life Ins. Co. v. Mowry*, 96 U. S. 544. It seems to us to be more logical to follow the tendency of the courts and to frankly admit that in recognizing the parol waiver theory the parol evidence rule is clearly violated and to establish an exception in the case of insurance policies. *Welch v. Association*, (Wis.) 98 N. W. 227; *Spalding v. Ins. Co.*, 71 N. H. 441.

Such an exception seems to be founded on reason and justice and should meet with our approval. It is hard to find any substantial reason why the knowledge by an authorized agent of the company of facts affecting the validity of a policy at its inception should not be considered as the knowledge of the company and the company be estopped to set up such facts to defeat a recovery on the policy. *Robbins v. Springfield Fire Ins. Co.*, 149 N. Y. 484; *Forward v. Continental Fire Ins. Co.*, 142 N. Y. 382. A rule of evidence adopted by the courts as a protection against fraud and false swearing would, as was said in regard to the analogous rule known as the "Statute of Frauds," become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. *Vance on Insurance*, p. 358.

#### EJECTMENT—REMOVAL OF TELEPHONE WIRES.

Ejectment is a form of action by which possessory titles to corporeal hereditaments may be tried and possession obtained. The action lies for the recovery of corporeal hereditaments only and cannot be maintained where the subject matter of the action is incorporeal or intangible; for the latter cannot be delivered in execution by a sheriff and are not subject to entry. These propositions are fundamental. *Sedgwick & Wait, Titles to Land*, Chap. IV. It is also elementary, that in its legal signification land has an indefinite extent upwards as well as downwards, the term including not only the face of the earth, but everything under it or over it as expressed by the maxim *cujus est solum, ejus est usque ad caelum*, 2 *Blackstone's Com.*, 18.

In *Butler v. Frontier Telephone Co.*, 36 N. Y. Law Jour. 1139, the defendant had wrongfully stretched telephone wires across the land of the plaintiff without in any way physically touching the soil. The question presented was whether an action of ejectment would lie. The statutory action of that name in New York where the question arose being practically the same as ejectment at common law. The practical importance of the question being in the fact that there are certain advantages to the plaintiff peculiar to ejectment not to be had in other actions. By the application of the principle *cujus est solum* it was held that ejectment would lie on the ground that there had been an ouster from part of the land. "According to fundamental principles and within the limitation mentioned, space above land is real estate the same as the land itself. The law regards the empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly."

The precise question here presented does not seem to have been before decided except as this case was presented to the lower courts. 109 App. Div. 217, Yale Law Journal, Vol. XV, p. 246. A similar question involving the same principle however has frequently arisen where ejectment has been brought because of overhanging eaves or cornices. Under such circumstances it has been held that the action might be maintained. *Murphy v. Bolger*, 60 Vt. 723; *McCourt v. Eckstein*, 22 Wis. 153. This was denied however in *Aiken v. Benedict*, 39 Barb. 400, upon the ground that the defendant had taken possession of nothing of which the sheriff could put the plaintiff in possession. The question was not discussed at length in any of these cases.

The doctrine upon which the decision in the present case is based namely, that land embraces the space above and the soil beneath the surface of the ground, is undisputable. But has not the court in the present instance unwarrantably extended this doctrine when it says that the law regards the empty space as a solid inseparable from the soil? Is it not more in accord with reason and common sense that the principle *usque ad coelum* means that the owner of land has a right in the nature of an incorporeal hereditament? Corporeal property signifies property in possession. By possession is meant physical dealing; consequently there can be no actual possession of anything which is intangible. An owner of land cannot physically possess the space above it any more than he can physically possess an easement or a servitude. If then, as clearly seems to be the case, the incidental right to the space above one's lands is an incorporeal hereditament, it is difficult to see how an action of ejectment may be maintained when another appropriates this space to his own use. The proper redress could be had by an action on the case or by a proceeding to abate a nuisance.

It has been repeatedly laid down that ejectment will not lie for anything of which a sheriff cannot deliver possession, the subject matter must be something tangible, something which can be delivered. *Child v. Chappell*, 9 N. Y. 246. In *Jackson v. May*, 16

Johns. 184, it was said that ejectment would only lie for something attached to the soil. In an early case it was held that such an action would not lie for a water course or rivulet though its name be mentioned, because it would be impossible to give execution of a thing which is transient and always running. *Adams on Ejectment*, 18. Such possession as is required can be given of mines, quarries and upper rooms in a house, because in each of these cases there is something which may be physically possessed. But a sheriff can no more deliver such possession of obstructed space by removing the obstructions as suggested by the present decision, than he can give physical possession of an easement by removing a nuisance which interferes with its enjoyment.

POLICE POWER—CONSTITUTIONAL LAW—REGULATION OF EXPRESS COMPANIES.

In view of the many important enactments, state and Federal, of late years, prohibiting discriminations in rates and service by public service corporations, and which have been upheld by the courts, the recent holding of the Supreme Court of Indiana in the case of *American Express Co. v. Southern Indiana Express Co.* (78 N. E. Rep. 1021), is perhaps in line with the weight of authority on this point.

The statute of Indiana (Acts 1901, p. 149), provides that express companies shall grant to all consignors, including other responsible express companies as consignors, equal terms and accommodations in the carriage and continuance of carriage of goods and prohibits them from granting to any one carrier any privileges or accommodations not granted to all others.

The case under discussion arose on a statutory remedy of injunction sought by the appellee for a violation of the above statute, and upon the hearing the act was declared a valid exercise of the police power and not violative of the fourteenth amendment of the Federal Constitution on the ground that it is an attempt to deprive an express company of its rights and to take its property without due process of law; and further, that it attempts to take from an express company the common law right to contract. Although the court does not enter into a discussion of the police power of the state, its decision is fully sustained by the decisions of the same and other courts.

"Great interests which have grown up and which closely and seriously affect the commercial convenience and prosperity of all the people of the state.—interests which, in their present form and dimensions, were unknown to the common law—are both proper and necessary subjects of police protection, regulation and control. It cannot be safely admitted that these vast and powerful agencies, by and through which a large part of the carrying trade of the people of the state is conducted, are beyond the control of the legislature. The well-being of the people demands that they shall at all times be subject to the rein and curb of the law, and that their methods of conducting their business must

conform to those principles of fairness and justice with which the interests of the public are inseparably bound up. The relations of such agencies to the public and to each other, and an authoritative declaration and definition of their duties and obligations, are clearly within the scope of legislative authority wherever important public interests are involved." (*Adams' Express Co. v. State*, 161 Ind. 328.)

The act under examination belongs to that class of legislation which has been found necessary to prevent the destruction of competition, and exclusive possession by the few of the great fields of industry and enterprise. It has never been denied that in the exercise of the police power, property rights may be sacrificed, natural privileges curtailed, and liberty restricted or taken away. However, as the public peace, safety and well-being are the very end and object of free government, legislation which is necessary for the protection and furtherance of this object cannot be defeated on the ground that it interferes with the common law rights of some of the citizens, or even deprives them of such rights. (*Railroad v. Jackson*, 179 U. S. 287.)

While the tendencies of these decisions, carried to extreme limits, would seem to subject the public to any and all sorts of legislation enacted under the guise of an exercise of the police power, yet this danger is not apparent when it is considered that review may be had by the courts of all such legislation where constitutional rights and guaranties are involved, thus limiting, in such cases, the otherwise sole and absolute legislative discretion in matters involving the public welfare.

#### MORTGAGES—INJUNCTION TO RESTRAIN FORECLOSURE UNDER POWER OF SALE—LIMITATIONS.

*House v. Carr*, 78 N.E. 176, decided by the Court of Appeals of New York, presents an unusual as well as difficult question of equity. The suit was brought by the successors of the mortgagor to restrain by injunction the foreclosure of a mortgage barred by the statute of limitations. For twenty years the original mortgagee made no effort to enforce his right against the mortgagor and for over seven years after the statute of limitations had run he made no demand upon the successors of the mortgagor in possession of the land. Satisfaction of the mortgage was not claimed in the complaint. The foreclosure was being sought by the administrator of the mortgagee. This court refused to restrain the foreclosure reversing the judgment of the Appellate Division. Vann, Haight and Werner, JJ., *dissenting*. The majority opinion delivered by Cullen, C. J., cites *Goldfrank v. Young*, 64 Tex. 432 as in point and follows its arguments considerably. In that case a sale under a trust deed was allowed, although the right of action secured thereby was barred by the statute of limitations. The creditors had urged their claims and no great time had elapsed as in this case of *House v. Carr*. There the very attitude of the debtor clearly showed a calculating inten-

tion to avoid payment of the debt which he had no reason to believe had been abandoned.

The principle that a statute of limitations affects the remedy but not the merits seems well established in New York. *Herlbert v. Clark*, 128 N. Y. 295; *Campbell v. Holt*, 115 U. S. 620. Cullen, C. J., says: "though the statute may have barred one remedy on the debt, if there be another remedy not affected by the statute, or one to which a different limitation will apply, a creditor may enforce his claim through that remedy." Applying that principle to this case the court held that the limitation did not bar the statutory foreclosure by advertisement, so no relief could be had, although the debt and mortgage had been barred for over eight years. This principle thus extended seems to violate that spirit of equity that frowns on stale claims and that equity will refuse to enforce a right when one by neglect has not asserted his right until its assertion would take the defendant by surprise and involve him in litigation which by acts of parties he was justified in believing had been abandoned. *Helen v. Yerger*, 61 Miss. 44. The fact that this man is entitled to relief by statute and yet is powerless to set up the defense simply by defendant's choice of mode of foreclosure seems unjust. The injustice is well argued by Vann, J., in the dissenting opinion. On examination of the cases the fault appears to be in the statute and not in the application of the law. By a peculiar state of facts the statute of limitations is avoided, its spirit rendered powerless. A statute allows a sale out of court to have equal presumptive force and effect as though executed by order of court. To the foreclosure in court the statute of limitations is a complete defense; to the foreclosure out of court reaching the same result there is no remedy. Cullen, C. J., states in the majority opinion that this statute has been practically the same for a century. The common law presumption of payment, after twenty years, the statutes of limitation, equity's attitude toward laches and equity's recognition of the statutes of limitation by analogy are all based upon the appreciation that great hardship is done in enforcing old claims and that the ends of justice require the encouragement of the diligent. The plaintiffs in this case are in a defensive position. Vann, J., in the dissenting opinion argues that equity should look to the substance and not the form and thus grant the relief sought. In *Butler v. Johnson*, 111 N. Y. 204, quoted by Vann, J., an injunction was allowed as in substance a defense, but there the result attained was the same as that to which the plaintiff would have been entitled if the executrix had been allowed to continue her purpose.

In the present case the defensive position of the plaintiffs is easily conceded, but the relief sought, by injunction, is primarily an affirmative relief. In the plaintiff's behalf equity could not relieve from the cloud of title, so here equity will not grant relief from the foreclosure by a defense, the instrument of which is affirmative action and which in effect would clear the cloud from the title. 1 *Pomeroy's Equity*, 421. Mr. Justice Miller says that



the defense of lapse of time to an obligation to pay money is no natural right. "It is the creation of conventional law." *Campbell v. Holt*, 115 U. S. 620. Aside from the theory of the right of a defense given to a party in a given instance it seems unjust that circumstances should be allowed to prevent his taking advantage of the defense. Strict following of technical principles, however, seems to warrant this decision under consideration. The remedy for the apparent injustice seems to depend on legislative action. But in this day of complicated difficulties in obtaining needed legislation it affords a good subject for serious consideration whether it would not be more practicable for equity to take the broad liberal attitude to promote justice, the spirit in which is expressed in the able arguments of Vann, J., in the dissenting opinion.

#### RE-DELIVERY OF DEEDS—CONSTRUCTIVE TRUSTS.

An abstract principle of law may be well recognized, yet in the application of it to concrete facts as they may arise in new and varying forms, there is often a source of considerable difficulty. And it is in this correlating of old principles and new facts that our interest is largely centered.

A decision handed down October 23, 1906, by the Supreme Court of Illinois in the case of *Crossman v. Keister*, 79 N. E. 58, is well illustrative of the foregoing. Two important questions are there discussed, one being as to the legal effect of a re-delivery of a deed by the grantee therein to the grantor with the intention of re-vesting title in the latter; the other relative to the creation of a constructive trust.

In regard to the first proposition, the Court holds that such re-delivery cannot operate to pass the legal title. 5 Ill. 452; 70 Ill. App. 185. This seems to be the rule except in three New England jurisdictions, where by invoking the aid of the *estoppel in pais* doctrine the purpose of the parties is effectuated. 24 Me. 311; 9 Pick. 105; 33 N. H. 487; Washburn on Real Property (VI Ed.) Sec. 1907. The Court proceeds to state, however, that such an act under certain circumstances will suffice to pass an equitable title to the property. This doctrine if carried out to its logical results would seem to be as effectual in precluding the rights of the grantee in the deed as the doctrine just previously noted. 112 Ill. 146; 159 Ill. 84; 42 N. E. 305; 156 Ill. 183; 41 N. E. 39.

Relative to the second proposition: the testator gave orders that a deed from his daughter to himself should be returned to her after his death, being induced thereby by the daughter's promise to convey to a third party (appellee). The proof adduced at the trial showed that the daughter at the time of making the promise had no intention of fulfilling it. The re-delivery of the deed in this case, not passing the title to her, the land descended was administered upon, and the daughter received a fifth part thereof as her share, for a conveyance of which this bill was brought by appellee. The Court, after a careful review of the authorities, holds that the daughter by her acts was constituted a constructive

trustee, and, as such, must convey the land which she had received to appellee.

The rule has been repeatedly laid down that where a party procures a devise of land upon a fraudulent promise to convey to another, equity, acting in the exercise of its almost plenary jurisdiction in cases of fraud, will decree such party a trustee. *Pomeroy Eq. Jur.* Sec. 1054; *Browne on Frauds*, Sec. 94. And it is not incumbent that the promise shall be in writing, it being a trust *in invitum* and falling specifically within the exceptions enumerated in the Statute of Frauds. It arises by implication or operation of law, being based on the ground of fraud. Under this head, the rules of equity are extremely flexible so as to meet and rectify any new form of imposition that may arise. Here no devise was procured by fraud, but by fraud the testator was procured to allow the land to descend instead of devising or deeding it. If it had not been for the fraudulent promise he would undoubtedly have had time to and would have disposed of it before his death in accordance with his wishes.

By parity of reasoning, the same rule applies as in the former cases. The reason for it is augmented by the fact that the parties stood in a confidential relation, the daughter having the ascendancy over her father. To show the solicitude manifested by courts of equity in such cases, Lord Chelmsford says in his opinion in *Tate v. Williamson*, L. R. 2 Chan. Ap. Cas. 55, "The jurisdiction exercised by courts of equity over the dealings of persons standing in fiduciary relations has always been regarded as one of a most salutary description. The principles applicable to the more familiar relations of this character have been long settled by many well known decisions, but the courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. Whenever two persons stand in such a relation that confidence is necessarily reposed by one, and the influence that naturally grows out of that confidence is abused, or the influence exerted to obtain an advantage at the expense of the confiding party, the party availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no confidential relation had existed."

Fraud is much more easily inferred where the parties stand in a fiduciary relation. The rule is generally recognized that where one party, standing in such relation, obtains or procures property from the other upon a parol promise to dispose of it to someone else or to hold it in trust for designated purposes, and has at the time no intention of doing so, the law will raise a constructive trust. 176 Ill. 478; 52 N. E. 58. Cases collected in *Brison v. Brison*, (Cal.), 17 Pac. 689. "Where a person by means of his promises, or otherwise by his general conduct, prevents the execution of a deed or will in favor of a third party with a view to his own benefit, that is clearly within the first head of frauds as distinguished by Lord Hardwicke, viz.: that arising from facts and circumstances of imposition; and the person so acting will be

decreed to be a trustee for the injured party, to the extent of the interest of which he has been thus defrauded." *Hill on Trustees*. In this case the property was not obtained in the way anticipated. Nevertheless it was obtained, which would not have been the case had it not been for the fraudulent promise, and it is inequitable that the party should retain the fruits of her wrongs as an advantage of it.

#### IS A PERSON PROCURING A TICKET BY FRAUD A PASSENGER?

In the case of *Fitzmaurice v. N. Y., N. H. and H. R. R. Co.*, decided by the Supreme Court of Massachusetts and reported in 78 N. E. 418, it was decided that a person, who by fraud, procured a ticket at a reduced rate, was not a passenger. So to recover for an injury while on the train of the defendant company, nothing short of a wilful injury could be proved to support the plaintiff's action.

It is a well recognized principle of law that a trespasser on railroad property is protected only from wilful wrong on the part of the railroad. *Condren v. Chicago, Minn. & St. Paul Railway Company*, 67 Fed., 522. Another principle, supported by a great weight of authority, sustains the proposition that the duties of a railroad company to a person as a passenger only attach when that person has been *accepted* as a passenger. Such a relation can only be entered into by means of a contract between the railroad company and some person. This contract may be expressed or implied. Hale, *Bailments and Carriers*, p. 493.

It is also maintained by many authorities that this relation must have been entered into fairly, and fraud on the part of the passenger in evading fare avoids the contract 'o carry as a passenger and makes the latter a trespasser. *Toledo, Wabash and Western Railway Co. v. Beggs*, 28 Am. St. Rep., 613.

There appears to be nothing illogical in this doctrine and no stricter than is necessary to protect the railroad. But for a decision by the United States Circuit Court for New York reported in the case of *Robostolli v. N. Y., N. H. and H. R. R. Co.*, 33 Fed. 796, the decisions would appear to be almost unanimous in their general trend, holding that a person cannot become a passenger by practising a fraud on the railroad. That was a case where a person presented for passage on a train of the defendant company, a non-transferable commutation ticket issued to another. The trial judge instructed the jury that if he presented in good faith the ticket, and he was carried as a passenger upon it, he was then entitled to the protection afforded other passengers. This instruction was upheld on the ground that he did not represent himself to be Roehrs, the person to whom the ticket was originally issued. The Court said, "But here the intestate was in a passenger car, on a passenger train, claiming to be a passenger on the commutation ticket, and his claim was recognized." It is difficult to imagine how anybody could present a non-transferable ticket, issued to someone else, in good faith. Why

the mere presentation of the ticket issued to someone else was not an attempt to represent himself as Roehrs, does not seem clear.

There might seem to be some hardship in the case of a person who had paid all but a few cents of the price of his ticket, with knowledge of the fact, being precluded from an action for a broken leg, but the law applied logically would undoubtedly deny the holder of the ticket any remedy. In the principal case, the fact that the conductor had accepted the coupons in payment of the fare of the plaintiff could make no difference in the final result, as such only shows what a skilful unprincipled person can do. Surely no estoppel could be invoked where one's rights are not known. Or had the conductor accepted the coupons with knowledge of the facts, the company's liabilities and duties would not thereby be increased, as he would exceed both his actual and apparent authority; he could not waive the defendant's rights.

It is the fraud, in whatsoever form it may appear, that changes the apparent status of passenger to that of trespasser. This view maintained by the Supreme Court of Massachusetts certainly seems to be supported by logic and authority.

## RECENT CASES.

**APPEAL—WAIVER—STIPULATIONS—AVOIDANCE—ARTHUR D. JONES CO. V. SPOKANE VALLEY LAND & W. CO.,** 87 PAC. 65 (WASH.).—*Held*, that where parties to a suit made a stipulation that any appeal taken from the judgment of the trial court should be taken in time to be heard at a certain date otherwise to be dismissed, a mistake by counsel as to the date of the commencement of the term was not a sufficient cause to avoid the dismissal. *Fulton, J., dissenting.*

The right of appeal is favored in the law and will not be held to have been waived except on clear and decisive grounds. *Hixon v. Oneida County*, 82 Wis. 520. Nevertheless, the right of appeal may be waived by an agreement supported by sufficient consideration. *Mackey v. Daniel*, 59 Md. 484. But not if agreement was the result of fraud, mistake, or surprise. *Town of Alton v. Town of Gilmanton*, 2 N. H. 520. Nor in criminal cases, *Smith v. Commonwealth*, 14 S. & R. (Pa.) 69. Such an agreement does not take away the right of the court to review on writ of error. *Putnam v. Churchill*, 4 Mass. 516. The attorney-general may waive his right of appeal by parol agreement and the same is binding on his successor. *Peo. v. Stephens*, 52 N. Y. 306. While there seem to be no cases involving mistake as applied to an agreement of this kind, it has been held, in the absence of any agreement, that an omission to file appeal papers owing to a mistake of fact, is not a sufficient cause to avoid dismissal of the appeal. *Gill v. Hudson*, 14 La. 203; *Rain v. Thomas*, 12 Fla. 493.

**ASSAULT AND BATTERY—DAMAGES—FRIGHT OF WIFE.—HUTCHINSON V. STERN,** 101 N. Y. SUP. 145.—*Held*, that the plaintiff in an action for an assault committed on him in the presence of his wife, cannot recover for injuries to the wife, occasioned by fright, and subsequent loss of service of the wife. *Kruse and Spring, J. J., dissenting.*

The general rule is that pain of mind is only the subject of damages when connected with bodily injury. *Morse v. Duncan*, 14 Fed. 396. However, this is subject to the qualification that a recovery for mental injuries and suffering alone is not precluded in cases of wilful tort. *Williams v. Underhill*, 71 N. Y. Sup. 291. So where plaintiff's wife was sick so that they could not move at the termination of his lease, and defendant started to tear down the house, exciting the sick woman and filling her room with dust, so that she had to be removed and shortly died, the defendant was held liable, though deceased suffered no immediate personal injury, and her death was due solely to fright and excitement. *Preiser v. Wielandt*, 62 N. Y. Sup. 890. But where the fright and mental suffering was not caused by a wilful tort but by an accident, no action can be maintained to recover the damages thereby sustained. *Lehman v. Brooklyn City Ry. Co.*, 47 Hun. 355. No well considered case has held that fright alone, not resulting from some physical injury to the person, will sustain an action for negligence. *Ewing v. Pittsburg C. and St. L. Ry. Co.*, 147 Pa. 40.

**BILLS AND NOTES—IRREGULAR INDORSERS—LIABILITY—GOLDING SONS CO. V. CAMERON POTTERY CO.,** 55 S. E. 396 (W. VA.).—*Held*, that when a payee

does not indorse a promissory note, he may, in the absence of any agreement, treat irregular indorsers as joint promisors, or as guarantors, or as indorsers at his election.

This case emphasizes a divergent view on a point about which the decisions are inharmonious. The most widely prevailing view is that, under the conditions set forth, an irregular indorser is presumptively either a joint maker, *Union Bank v. Willis*, 8 Metc. (Mass.) 504; *Hamilton v. Johnston*, 82 Ill. 39, or a guarantor, *Riggs v. Waldo*, 2 Cal. 485; *Harding v. Waters*, 74 Tenn. 324. Some jurisdictions, however, hold that where the indorsement was made to give the maker credit with the payee the irregular indorser is liable as first indorser. *Moore v. Cross*, 19 N. Y. 227; *Blakeslee v. Hewett*, 76 Wis. 341. While other courts make the distinction that an irregular indorser before delivery is a joint maker, an irregular indorser after delivery a guarantor. *Thomas v. Jennings*, 13 Miss. 627; *Powell v. Thomas*, 7 Mo. 440.

**CARRIERS—ACTION FOR INJURY TO PASSENGERS—NEGLIGENCE A MATTER OF LAW—PITTSBURGH RY. CO. v. BLOOMER**, 146 FED. 720 (PA.)—*Held*, where a motorman started a street car forward without any signal from the conductor, and a passenger alighting therefrom was injured, there being no conflict of evidence on this point, the trial judge is justified in charging the jury as a matter of law that the defendants were negligent.

It sometimes happens, when the facts are not ambiguous and there is no room for two honest and reasonable men to arrive at different conclusions, that negligence becomes a question of law for the judges to decide. *Ry. Co. v. Van Steinburg*, 17 Mich. 99; *Ry. Co. v. Stout*, 17 Wall. 657. But there is no general rule, the application of which will determine in every case, with certainty, whether the inference as to negligence, to be drawn from ascertained facts, is one of fact or of law. *Farrell v. Waterbury Horse Ry. Co.*, 60 Ct. 239. The mere finding of all the facts by the court does not make negligence a question of law, for such a course would speedily put an end to all jury trials. *Williams v. Clinton*, 28 Ct. 264; *Fiske v. Bleaching Co.*, 57 Ct. 119. Nor is it true that when the court finds facts undisputed, the question of negligence is necessarily one of law. *Ry. Co. v. Van Steinburg*, 17 Mich. 99; *Warton on Neg.* Sec. 420. But where there has been a clear breach of legal duty and special findings of fact are made by the court, it may hold negligence to be a conclusion of law. *Nolan v. Ry. Co.* 53 Ct. 461; *Beardsley v. Hartford*, 50 Ct. 529. This is a much more simple question when the measure of duty is precisely defined by law. Then a failure to attain that standard is negligence in law. *Beach on Contrib. Neg.*, Sec. 163.

**CARRIERS—DISCRIMINATION—CONSTITUTIONAL LAW—DEPRIVATION OF PROPERTY—LOUISVILLE & N. R. CO. v. CENTRAL STOCKYARDS CO.**, 97 S. W. 778. (KEN.), Const. Sec. 213 requires all railroads to transfer, deliver and switch empty or loaded cars coming to or going from any railroad with equal promptness and dispatch, and without discrimination, and to deliver, transfer, and transport all freight from and to any point where there is a physical connection between the tracks of such carrier and those of a connecting carrier. *Held*, that the performance of the duties imposed by such section did not deprive the carrier of his property without due process of law, though the performance thereof put the carrier to an increased expense and necessitated its parting

with the possession and control of its cars for a reasonable time, while they were in the possession of a connecting rival carrier. Barker, J., *dissenting*.

The above case is one of decided interest especially at this time on account of the great discussion in regard to the various phases of interstate commerce and its increasing importance. A consignor of goods, after they have passed from the hands of the R. R. Co. with which the contract of affreightment was made, into the hands of another Co., has the same right to change their destination while *in transitu*, as if the first Co., had a continuous line to the place of destination, *Penn. R. R. Co. v. Rennoch*, 51 Penn. 244; 4 Kan. 378. *Contra, Childs v. Digby*, 24 Penn. St. 23. But the contention of the dissenting judge is that there is a taking of private property without the owner's consent and for the private use of another which is not due process of the law and therefore a violation of the 14th Art. of the Constitution of the U. S. and he quotes the famous case of *Loan Association v. Topeka*, 20 Wall. (U. S.) 655 to substantiate this proposition. However the greater weight of authority follows the majority opinion of the judges in this case.

**CARRIERS—WHO ARE PASSENGERS—FITZMAURICE v. N. Y. N. H. & H. R. R. Co.**, 78 NORTHEASTERN 418 (Mass). In this case the person injured as the result of a collision had obtained a ticket by presenting to the agent a forged certificate that she was under eighteen, and a pupil in a certain school, the railroad having contracted to convey pupils at reduced rates. *Held*, that the carriage of the person was brought about by fraud and that she was not a passenger. See Comment *ante*.

**CHARITABLE INSTITUTIONS—INJURIES TO SERVANTS—HEWETT v. WOMAN'S HOSPITAL AID ASS.**, 64 ATL. 190 (N. H.).—*Held*, that a hospital conducted as a charity is liable for the negligence of its manager in failing to notify a nurse of the contagious nature of a case assigned to her. The court points out that the hospital is incorporated under a general charter, and that although it has no capital stock and made no division of profits, and all its property was devoted to charitable uses, it is liable, and cites a number of English and American cases. The court also rejected the contention that as the plaintiff was an apprentice learning a trade, she was not a servant, and that the corporation was therefore relieved of its ordinary duty to her in that capacity.

**CONSPIRACY—RIGHT TO EXCLUDE PERSON FROM THEATRES—PEOPLE EX REL. BURNHAM v. FLYNN**—100 NEW YORK SUPP. 31. The defendants conspired to prevent the plaintiff from exercising a lawful trade or calling. Because of various criticisms made of the plays given at the various theatres, the defendants had given instructions that the critic should not be admitted, and he had been forcibly prevented from entering after purchasing a ticket. *Held*, that the conducting of a theatre is a private enterprise, and that, in the absence of Statutory regulation, the proprietor has the right to say who shall enter. Under this doctrine the court states that the agreement to exclude the critic was not an unlawful one, and that if his presence was distasteful as injurious to their business the proprietors had the lawful right to agree to exclude him.

**CORPORATIONS—CORPORATE EXISTENCE—COMMONWEALTH EX. REL. ATTORNEY GENERAL v. MONONGAHELA BRIDGE CO.**, 64 ATLANTIC 909 (Pa.) The city of Pittsburgh bought all the shares of the capital stock of the stockholders of a bridge company. *Held*, that all the shares of a corporation are held by one person does not effect the existence of the corporation.

A corporation, other than a joint-stock corporation, may be dissolved by the death of all its members or the withdrawal of all its members, or of such a number of its members that too few remain, under the constitution of the corporation, to continue the succession and fill vacancies, *Blackwell v. State*, 36 Ark. 178; *Philips v. Wickham*, 1 Paige 590 (N. Y.) But it is not dissolved by the fact that all the shares of its capital stock have come into the hands of a single stockholder, or of a less number of stockholders than were required by the statute in the formation of the corporation. *In re Bolton*, 47 La. Ann. 1614; *Louisville Banking Co. v. Eisenman*, 94 Ky. 83. Although under such circumstances, corporate action may be suspended, *Swift v. Smith*, 65 Md. 428, and a surrender of a charter by a corporation may be presumed from a neglect, for a long time, to choose corporators, *State v. Trustees of Vincennes University*, 5 Ind. 77. A corporation composed of many stockholders may be dissolved by an individual obtaining possession of all the stock. *In re Bellona Co.*, 3 Bland 442 (Md.) This last decision was rendered in 1831, and then represented a minority rule, but the general tendency since has been to reject it and now it is doubtful if there is any minority rule on this subject. *Bridge Co. v. Traction Co.*, 196 Pa. 25; *Morawetz on Private Corporations*, 1009, 10 Cyc. 1277. It makes no difference in principle whether the sole owner of the stock of a corporation is a man or another corporation, *Exchange Bank v. Construction Co.* 97 Ga. 1-6.

**CRIMINAL LAW—DEATH SENTENCE FOR LIFE CONVICT—***BROWN v. STATE*, 95 SOUTH WESTERN 1039, (Tex.)—*Held*, that although one is serving a life sentence for murder, such previous conviction does not constitute a bar to a second prosecution for murder, which may result in conviction and a death sentence may be put into effect immediately.

**CRIMINAL LAW—LARCENY—STEALING GAS.—***WOODS v. PEOPLE*, 78 NORTH-EASTERN, 607 (ILL.)—*Held* that the occupant of a building who removes the meters and substitutes rubber hose connections, is guilty of grand larceny as feloniously taking the personal goods of another. The defendant's plan was to remove the meter as soon as the gas inspector had read it, and connect the pipes by means of rubber hose, this connection being left in place until near the time for the reappearance of the gas man, when it was removed and the meters replaced. It was also held in this case that in ascertaining whether the value of the gas taken was sufficient to make the offense grand larceny, the value of the gas consumed upon a number of consecutive days should be added together, and that the gas taken on each separate day did not constitute a separate offense. It was further held that in ascertaining the value, the jury should be guided by the selling price and not by the cost price of the gas.

**DEAD BODIES—MUTILATION—DAMAGES—MENTAL ANGUISH.—***LONG ET AL. v. CHICAGO, R. I. & P. R. R. Co.*, 86 PAC. 289 (OKL.)—*Held*, that the parents of a deceased child are not entitled to damages for mental pain caused by the mutilation of the dead body of the child.

*Cooley*, in his work on torts, p. 280, says: ". . . the owner of the lot in which the body was deposited might maintain trespass *quare clausum* for its disinterment and recover substantial damages, in awarding which the injury to the feelings would be taken into consideration." It logically follows that a court that would allow damages for mental anguish caused by mutilation after burial would also allow the same damages for mutilation before



burial. And in accordance to this principle it was held in *Renheim v. Wright*, 25 N. E. 822 (Ind.), decided in 1890, in a case parallel to the present one, that mental anguish should be considered in awarding damages. Also *Wadsworth v. Telegraph Co.*, 86 Tenn. 695, where there was no pecuniary loss but only mental pain. Damages for mental anguish have been granted by the current weight of authorities. *Bessemer Land and Imp. Co. v. Jenkins*, 111 Ala. 135; *Am. & Eng. Ency. of Law*, Vol. 8, p. 54 (2nd edition); *Koerber v. Putek*, 102 N. W. 40 (Wis.); *Thurfield v. Mountain View Cemetery*, 12 Vt. 76. That a corpse is personal property is held in *Bogart v. City of Indianapolis*, 13 Ind. 135. Also a very strong case in favor of damages for mental pain is *Larson v. Chase*, 50 N. W. 238.

EMINENT DOMAIN—RIGHT OF WAY THROUGH CEMETERY. *R. R. Co. v. Forest Hill Cemetery Co.*, 94 SOUTHWESTERN 69 (TENN.)—*Held*, that "the wheels of commerce must stop at the grave." It was sought to have a right of way for the railroad condemned through a portion of the cemetery which had not as yet been used for burial purposes, for the reason that other available rights of way would be more difficult and more expensive to prepare.

HUSBAND AND WIFE—POWER TO CONTRACT.—*MATTHEWSON V. MATTHEWSON*, 79 CONN. 23. An action by a wife against her husband to recover the amount of a promissory note given to her.—*Held*, the right to make a contract carries with it a right to sue for its violation.

A contract between husband and wife is valid and an action for breach will lie, *George v. High*, 85 N. C. 99. Husband may lawfully borrow money from his wife and thereby become her debtor, *Rowland v. Plummer*, 50 Ala. 182. Where a husband borrowed money from his wife and gave his note, declaring it belonged to her separate estate, his estate is liable. *Bryant's Adm'r's v. Bryant*, 66 Ky. (3 Bush.) 155. Also the husband's note is valid. *Logan v. Hall*, 19 Ia. 491. The husband's estate is liable for loans from the wife, *Whitford v. Daggett*, 84 Ill. 144; *Johnston's Adm'r's v. Johnston*, 1 Grant's Cases, 468 (Penn.). It has been held that when a wife loaned money to her husband and he used it to pay off mortgages on property owned by both, that the wife could recover from his estate. *Greiner v. Greiner*, 35 N. J. Eq. (8 Stew.) 134. The husband's parol promise to repay a loan to the wife will be enforced in equity, *Schaffner v. Renter*, 39 Barb. (N. Y.) 44; and though there be no formal agreement or promise to repay, it was held to be a loan. *McNally v. Weld*, 30 Minn. 209. No express promise to pay is needed, it will be implied. *Steadman v. Wilbur*, 7 R. I. 481. It has been held where money is loaned by the wife to the husband an action cannot be maintained in law or in equity against his person or estate. *Woodward v. Spurr*, 141 Mass. 283. A woman cannot contract with or sue her husband. *Fowle v. Torrey*, 135 Mass. 87.

MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMPTION OF RISK.—*SWARTS V. R. M. WILSON MFG. CO.*, 100 N. Y. Supp. 1051.—*Held*, that where an experienced servant complained on Monday of the manner in which the machine he tended was operated, and the master promised to remedy the matter on the following Saturday, and he was injured in the meantime owing to the condition complained of, he did not assume the risk. *Nash and Williams, JJ., dissenting.*

Cases on this point are in conflict. As a general rule if a servant continues in the service of his employer after he has knowledge of any unsuitable

appliances in connection with which he is required to labor, and it appears that he fully comprehends and appreciates the nature and extent of the danger, he will be deemed to have assumed all risks incident to the service under such circumstances. *Conley v. American Express Co.*, 87 Me. 352; *Marsh v. Chickering*, 101 N. Y. 396. *Meador v. Lake Shore and Mich. South. Ry. Co.* 138 Indiana 290, holds that where an employe, whose duties require him to use a ladder, discovers that the ladder is defective and dangerous, and notifies the master, who promises to furnish another, but before doing so the employee, in using the defective ladder is injured, the master is not liable, although the service in which the ladder was used was of a kind which could not be postponed. A workman is under no obligation to continue working in a dangerous place of employment. If he does so, with every opportunity to know the danger he cannot excuse his own want of care in failing to notice and guard against it, by alleging that his employer promised to do this and had failed to observe his promise. *Reese v. Clark*, 146 Pa. 465. *Snowberg v. Nelson—Spencer Paper Company*, 43 Minn. 532, holds, however, like the case in point, that the alleged promise of the defendant to remedy the defects and his request to plaintiff to continue using the machinery until he should remedy it, brings the case within the recognized exception to the general rule that a servant who uses defective machinery, knowing of the defects, and the consequent danger, does so at his own risk. *St. Clair Nail Co. v. Smith*, 43 Ill. App. 105, and *T. & N. O. Ry. Co. v. Bingle*, 9 Texas Civil App. 322 are also in point.

**MUNICIPAL CORPORATIONS—EMPLOYEES—COMPENSATION—MAY V. CITY OF CHICAGO**—78 N. E. REP. 912 (ILL.) A regular employe in the Collector's office did extra work for which he was promised extra compensation by the Collector. *Held*, that he was not entitled to it.

Employees in a city department are not entitled to extra compensation even though detailed and requested by the head officer of such department. *Bruns v. City of New York*, 6 Daly (N. Y.) 156; *Mersback v. City of New York*, 30 N. Y. Supp. 908. By the doing of extra work in making a digest of the laws, an attorney for the city cannot recover extra compensation. *Hays v. City of Oil City*, 11 Atl. 63; or other extra work. *People v. Supervisors*, 1 Hill (N. Y.) 362. When a Solicitor does extra professional work he does acquire the right to additional compensation, *City of Baltimore v. Ritchie*, 51 Md. 233, the same being held when a health officer performed extra duties, *Wendell v. City of Brooklyn*, 29 Barb (N. Y.) 204; and also in the case of a city treasurer for extra work, *City of Covington v. Maybury*, 9 Bush (Ky.) 304. A person accepting a public office at a fixed salary cannot claim additional compensation for extra work even though promised by a committee. *Evans v. City of Trenton*, 4 Zab (24 N. J. L.) 764. It has been held, however, that when a clerk does extra work, the additional sum so earned, is treated as an increase in salary which is allowed, providing the head officer of the department keeps his expenses within the limits of the appropriation. *People v. Corwin* 29 N. Y. Supp. 1077. Where duties are foreign to those for which he was employed he can recover for such extra work. *City of Detroit v. Redfield*, 19 Mich. 376.

**NEGLIGENCE—DANGEROUS MACHINERY—CARE REQUIRED—PLACES ATTRACTIVE TO CHILDREN.** *McAllister v. Seattle Brewing and Malting Co.*, 87 PAC. 68 (WASH.) *Held*, that where dangerous machinery of a character

likely to excite the curiosity of children, is left unguarded in an exposed place, where children are liable to be, though on the premises of the owner, and a child attracted to it is injured, the owner is liable.

Although a railroad company is not bound to the same degree of care in regard to mere strangers, who are on its premises, that it owes to others, yet it is not exempt from liability to such strangers for injuries arising from its negligence. *R. R. Co. v. Stout*, 17 Wall. 657. The cases following the above seem to be of two classes; the first, being based on the proposition that whenever a dangerous machine, attractive to children, and where they are wont to play, is left unguarded it is the duty of the railroad to keep it in a safe condition. *R. R. Co. v. Stout*, *supra*. *R. R. v. Bailey*, 11 Neb. 333. The second class is based on the theory of constructive invitation, i. e., if one is allured or attracted on to the premises, he is not a trespasser, and leaving an unguarded, attractive machine is such. *Keffe v. Milwaukee & St. Paul Ry. Co.*, 21 Minn. 207. The fact that a child is a trespasser will not necessarily preclude him from a recovery against a party guilty of negligence. *Birge v. Gardner*, 17 Conn. 507. Some States, however, contrary to the general rule, hold that he cannot recover. *Daniells v. R. R.*, 154 Mass. 349; *Frost v. R. R.*, 64 N. H. 220.

PARENT AND CHILD—CUSTODY OF CHILD.—*WORKMAN v. WATTS*, 54 SOUTHEASTERN REP. 775 (S. C.) Parents of a child placed her in the custody of her grandparents in her infancy and she was supported and educated by them till nearly fourteen years of age; at which time the parents sought possession of the child, who expressed under oath a desire to remain with her grandparents. There was no unfitness of either party shown. *Held*, that she would be allowed to remain with the grandparents.

We meet the old common law rule which gives the custody of the children to the father as against the mother and especially as against third persons, *Johnson v. Terry*, 34 Conn. 395. Unless it is of tender years, and its parents are separated. *Gray v. Field*, 19 Wk'l'y. Law Bul. 121. Yet the father may deprive himself of this right by ill-fitness or voluntary transfer of his right of custody, *Bently v. Terry*, 59 Ga. 555; but this transfer is invalid if the child is over fourteen years of age and it was done without the child's consent. *State v. Smith*, 6 Me. 462. There is a difference of opinion among the States as to the legal possibility of the transfer of the custody. As to this, the minority rule has been gradually disappearing. Some of those States have held that in such a transfer, there is a lack of mutuality and such an agreement is voidable as a delegation of powers. *Foulke v. People*, 4 Colo. App. 519, *Ward v. People*, 3 Hill 395. But those jurisdictions, which allow the transfer by the parents, hold it is not revocable unless some sufficient legal reason is shown. *Janes v. Cleghorn*, 54 Ga. 9; *State v. Barney*, 14 R. I. 62. This view has been developed farther and by the great weight of authority the Court will not restore the child unless it is for the benefit of the child, *People v. Lohman*, 17 Abb. Prac. 395. In such a case, the wish of the child is almost controlling, unless under tender age for then the welfare of the child must not be placed in jeopardy by the exercise of an immature judgment, *Curtis v. Curtis*, 71 Mass. 535.

PRINCIPAL AND AGENT—EXISTENCE OF AGENCY.—*EAGLE IRON CO. v. BAUGH*, 41 SOUTH. REP. 663. (ALA.)—*Held*, that the authority of an agent cannot be established by the declarations of the alleged agent.

The fact of the agency or the nature and extent of the authority cannot be established by the agent's own declarations. *Whiting v. Lake*, 91 Pa. 349; nor by his correspondence. *Hill v. Helton*, 80 Ala. 528; and this rule is just as inflexible in not allowing it proved by his affidavit, *Bowen v. Powell*, 1 Lans. 1. This is far from saying that an agent is an incompetent witness to prove the fact of the agency or authority. Where parol evidence, as to the existence of the agency or extent of the authority, is admissible at all, the agent is as competent a witness as any other person to testify under oath to facts within his knowledge touching the agency, *Rice v. Gers*, 22 Pick. 158; *Indianapolis Chair Mfg. Co. v. Swift*, 132 Ind. 197. Even the old rule of evidence, which excluded the testimony of a party in interest, made an exception in favor of the evidence of an agent produced to prove the fact of the agency, 1 *Greenleaf Evid.* 416; *Thayer v. Meeker*, 86 Ill. 470. And this applies equally when a husband is the agent of his wife or a wife of her husband, *Roberts v. N. W. Nat. Ins. Co.*, 90 Wis. 210. But if the authority be conferred in writing, parol evidence of any kind is generally inadmissible. *Neal v. Patten*, 40 Ga. 363; unless it be where the question of authority is only incidentally involved, *Columbia Bridge Co. v. Geisse*, 38 N. J. Law 39.

RAILROADS—REGULATIONS—STOPPING FAST MAIL—INTERSTATE COMMERCE RAILROAD COMMISSIONERS V. ATLANTIC LINE RY. CO., 54 S. E. 224 (S. C.).—Where accommodations furnished citizens of the state by an interstate railroad are inadequate, *held*, a writ of mandamus compelling the company to stop two fast mails or else furnish other equal facilities, is not an unreasonable burden on interstate commerce.

Congress alone has the power to regulate interstate commerce, Const., Art. I, Section 8, and when state legislation is in its essence and of necessity a regulation of interstate commerce, it is an encroachment upon the power of Congress over the subject, and is therefore void. *Cooley's Principles of Const. Law*, page 71. However, this must be distinguished from mere local aids for its improvement. *County Mobile v. Kimball*, 102 U. S. 691, 702. For, while a statute interfering with the mails of the U. S. has been considered not within reasonable police regulation and void; *Ill. Cen. R. R. v. Ill.*, 163 U. S. 142; yet a statute directing that passenger cars should be heated by stoves has been held to be a proper police regulation. *N. Y., N. H. and H. R. R. v. N. Y.*, 165 U. S. 628. And, although state regulations, if local in their nature and adapted to the locality, will not be considered void, *Cooley on Const. Law*, page 71, yet a state may not, under the cover of exerting its police powers, substantially prohibit or burden interstate or foreign commerce. *Ry. Co. v. Husen*, 95 U. S. 465. So while the cases seem to hold that local regulations are reasonable as long as they do not directly interfere with interstate commerce; whether the stopping of mail trains is such a regulation seems to be a matter of doubt.

REAL PROPERTY—TITLES BY POSSESSION—RIGHTS OF SQUATTERS.—LINK V. BLAND, 95 SOUTHWESTERN 1110 (TEX.).—*Held*, that a squatter may secure title to land after ten years' possession in spite of the fact that he took possession of the land without any claim of right and with the intention of holding the land if possible against all other claims. In this case the land belonged to a railroad company, and the claimant is given title to a quarter section which he cultivated and used as his homestead. The decision conforms to

previous decisions of the Texas court, and is made in spite of the statutory definition that adverse possession must be an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another.

**RESTRAINT OF TRADE—CONTRACT TO SECURE TRAFFIC—VALIDITY.**—*DELAWARE, L. & W. R. Co. v. KUTTER*, 147 FED. 51. Defendant railroad company entered into a contract with plaintiff to build up, develop, and conduct the business of the transportation of milk on its lines of road. Plaintiff was to have full charge of such business and was to receive as a compensation a percentage of the freights earned thereon. *Held*, that such a contract was not void as being in restraint of trade nor contrary to the anti-trust act to protect trade and commerce against unlawful restraint and monopolies.

The contracts prohibited by the anti-trust act of July 2, 1890, are simply those void under common law. *U. S. v. Trans-Missouri Freight Assn.*, 58 Fed. 58. And at the present day the mere fact that a contract to some degree restricts trade is not sufficient to avoid it. *Central Shade Co. v. Cushman*, 143 Mass. 353; *Hubbard v. Miller*, 27 Mich. 15. In order to be illegal such contracts must involve an appreciable diminution of the number of the persons engaged in the trade or of the supply furnished. *Fowle v. Park*, 131 U. S. 88; *Diamond Match Co. v. Roeber*, 106 N.Y. 473. So that each particular case must rest upon its merits and all the surrounding circumstances must be considered in determining whether a contract will operate as a restraint injurious to the public. *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64.

**REWARDS—OFFER AND ACCEPTANCE.**—*MCCLAUGHREY ET AL. v. KING*, 147 FED. 463.—Where defendant as sheriff of a county, offered a reward "for the arrest of each of the parties convicted" of a certain bank robbery and murder, *Held*, that the reward was not accepted merely by the giving of information concerning the whereabouts of the suspect, who was already under arrest in another state, but could only be accepted by the party assuming the personal danger and responsibility of either actually arresting the suspect or causing some other person to arrest him. Hook, J., *dissenting*.

As a general rule it may be stated that one who offers a reward may annex such conditions as he chooses, and one claiming the reward must prove a compliance with them. *Amis v. Conner*, 43 Ark. 337. And it has been held that a reward offered for the apprehension and conviction of each of the perpetrators of a crime is not earned by one who merely informs the governor of the state that one such person is in the penitentiary of another state, and who, without risk, responsibility, or expense to himself appears as a witness at the trial. *Lovejoy v. A. T. and S. F. Ry Co.*, 53 Mo. App. 386. Nor is a reward offered for the capture of a thief earned by merely giving information to the sheriff which enables him to find and arrest him, *Everman v. Hyman*, 3 Ind. App. 459; and this, although the party giving the information went with sheriff as one of his posse, to make the capture. *Juniata Co. v. McDonald*, 122 Pa. St. 115.

**SALES—CONVERSION OF GOODS BY CARRIER.**—*DUDLEY v. CHICAGO, MILWAUKEE & ST. P. RY. Co.*, 52 SOUTHEASTERN, 718—A quantity of apples was shipped with drafts on the buyer for their value according to a contract of sale attached to the bills of lading. On the arrival of the fruit at its destination the

railroad company permitted the buyer to inspect the apples without his producing bills of lading or showing any right or title to the apples. Finding them to be of inferior quality, the buyer refused to take them. *Held*, that the railroad company is not guilty of a conversion of the goods.

**SALES—RIGHT TO REGULATE REALES AND PRICE.—***HARTMAN v. JNO. B. PARK & SONS Co.* 145 FED. 358 (Ky.) *Held*, that contracts between the manufacturer and wholesalers to sell at a certain price and only to retail dealers, designated by the manufacturer should be sustained. The court disposes of the defense that the contracts were unlawful, as in restraint of trade, by a holding that the restraint in order to be unlawful must be unreasonable.

**SHIPPING—VALIDITY OF CONDITIONS IN TICKET—LIMITATIONS OF LIABILITY—***THE MINNETONKA*, 146 FED. 509—*Held*, conditions printed inconspicuously upon a steamship ticket, providing that the shipowner shall not be liable for any loss of passenger's baggage through theft or any act, neglect or default of the shipowner's servants or others, which were not known to such passenger are invalid, and constitute no defense to an action by him to recover jewelry stolen by one of the ship's employees.

As a general rule in the United States, a shipowner or other common carrier cannot, by stipulation in a contract of carriage, limit its liability for injury to goods of a passenger caused by the negligence or theft of its servants, on the ground of public policy. *The Hugo*, 57 Fed. 403; *Armstrong v. Express Co.*, 159 Pa. 640. Yet a rule that carriers will not be responsible for baggage beyond a certain amount unless its value is reported to them and its carriage paid for, is reasonable and obligatory if known to or brought home to the knowledge of the passenger. *Brown v. Eastern R. R.*, 11 Cush. 97. *Brehme v. Dunsmore*; 25 Md. 328. The carrier is under the same obligation, ordinarily, for the safety of luggage as of freight. *Hannible Ry. Co. v. Swift*, 12 Wall. 262. *Merrill v. Grunell*, 30 N. Y. 594. However, for such baggage as a passenger keeps in his own possession, a carrier is not liable as insurer but only for negligence. *Steamship Co. v. Bryan*, 83 Penn. St. 446; *Whitney v. Pullman Co.*, 143 Mass. 243.

**TIME—SOLAR OR STANDARD—COURTS—EXPIRATION OF TERM—***TEXAS TRAM AND LUMBER Co. v. HIGHTOWN*, 96 S. W. 1071 (Tex.)—*Held*, that in limiting the time of the expiration of a term of court limited by statute to a certain day, solar time and not standard or railroad time, should be used, though the community has generally adopted standard time.

A civil day is the mean solar day used in ordinary reckoning of time beginning at midnight. *Webster's Int. Dict.* The only standard of time recognized by the courts is the meridian of the sun, and an arbitrary standard set up by persons in a certain line of business will not be recognized. 28 *Am. and Eng. Ency. 2nd Ed.*, 210. The time to be used in determining the expiration of a policy on a certain date will, in the absence of statute or custom be determined by the common or solar time unless it is shown that a different time was intended. *Jones v. Ins. Co.*, 110 Ia. 75. The cases on the above point are very few but it seems to be settled as a general rule that solar time is to be used and is so decided as a matter of law in Georgia. In Nebraska it is merely a presumption, while in Kentucky and Iowa, a matter of custom. *Ins. Co. v. Peaslee Gaulbert Co.*, 1 L. R. A. (N. S.) 364.

**TRADE MARKS AND TRADE NAMES—TITLE OF PUBLICATION.** NEW YORK *HERALD v. STAR Co.* 146 Fed. 204.—*Held*, that complainant was entitled to protection in the trademark "Buster Brown," title of a comic section of a newspaper, as having used it exclusively for such a length of time as to acquire a proprietary right therein.

A sign, symbol, word or device which indicates origin or ownership of articles manufactured or sold, or an arbitrary symbol to distinguish a vendible commodity is a legal trademark. *Burton v. Stratton*, 12 Fed. 696 *Gowans v. Ahlborn Bros.*, 4 Kulp. (Pa.) 31. This is true independent of any statute. *L. H. Harris Stove Co. v. Stucky*, 46 Fed. 624, *La Croix v. May* 15 Fed. 236. The title in the main case is not merely descriptive words, *Spreker v. Lash*, 102 Cal. 38; *C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, 93 Tenn. 84; and the right to its exclusive use does not rest upon any property right therein, but upon priority of use and application as in the manner used by complainant, *Walton v. Crowley*, Fed. cases No. 17,133. Still such use may give rise to property rights which the law protects, *Clark v. Clark*, 25 Barb. (N. Y.) 76. A trademark is not essentially exclusive, *Clark Thread Co. v. Armitage*, 67 Fed. 904, only the particular application is protected, *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 57; and only at the residence of the user, *Sarton v. Schoder*, 101 N. W. (Iowa) 516. Registration may be required for full protection. *Whittier v. Diets*, 66 Cal. 78.

**TRADE-MARKS AND TRADE-NAMES—UNFAIR TRADE—REPAIRS FOR UNPATENTED MACHINE.**—*ENTERPRISE MFG. CO. v. BENDER, ET AL.*, 148 FED. 313 (O.)—Complainant manufactured and sold an unpatented meat chopper called the "Enterprise," which name was registered as a trade-mark, and also parts for replacing those that had become worn, which were marked with complainant's name. Defendants also made such replacing parts, selling them in packages marked to show for what machine they were made and by whom, but the parts themselves were not identified by any mark. *Held*, that defendants, while having the right to make and sell the parts, were not entitled to do so without clearly marking the same to prevent their being mistaken by retail purchasers for those made by complainant for its own machines.

In the absence of a patent the freedom of manufacture cannot be cut down under the name of preventing unfair competition. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169. But in making such article the public must not be led to believe it the product of another, *Schener v. Muller*, 74 Fed. 225. It is enough that such similitude exists as would lead an ordinary purchaser to suppose that he was buying the genuine article and not the imitation; and it is not necessary that the resemblance should be such as would mislead an expert. *Shaw Stocking Co. v. Mack*, 12 Fed. 707. The primary object and purpose of such mark, name or symbol is to distinguish each of the articles to which it is affixed from like articles produced by others, seems to be the clear consensus of all the cases which are authoritative, *Canal Co. v. Clark*, 13 Wall. 311; *Mill Co. v. Alcorn*, 150 U. S. 460.

**WATERS AND WATER COURSES—NAVIGABLE RIVERS—RIPARIAN RIGHTS.**—*KINKAD v. FURGESON*, 109 N. W. (NEB.) 744.—*Held*, that where the Missouri river suddenly changes its course and abandons its former bed, the respective riparian owners are entitled to the possession and ownership of the soil formerly under its waters as far as the thread of the stream.

The common law rule was that on navigable rivers the riparian proprietor's ownership extended merely to the high-water mark and the test of navigability was the ebb and flow of the tide. 3 *Kent*. 521; *Middleton v. Pritchard*, 3 *Scam.* (Ill.) 510. Some of the courts in this country have accepted this test of navigability and hold that in all rivers in which the tide does not ebb and flow the riparian proprietor's ownership extends to the thread of the stream. *Jackson v. Hathaway*, 17 *Mass.* 288; *Gavit v. Chambers*, 3 *Ohio*, 495. Other jurisdictions, however, have insisted upon a broader test as to navigability and maintain that where rivers are in fact navigable the riparian proprietor's ownership extends only to high-water mark. *Elder v. Burrus*, 6 *Humph.* (Tenn.) 358; *Pollard v. Hogan*, 3 *How.* (U. S.) 212.

**WITNESSES—COMPETENCY—HUSBAND AND WIFE.**—*BIANCHI ET UX V. DEL VALLE*, 42 *SOUTHERN* 148 (LA.).—*Held*, that a husband cannot be a witness for or against his wife in a matter affecting her paraphernal rights.

At early common law husband and wife were unable to testify for or against each other, this being based principally on public policy. *Wilson v. Sheppard*, 28 *Ala.* 623.

The common law disability has been removed and to-day a husband may be a witness for his wife in many cases. *Laudy v. Kansas City*, 58 *Mo. App.* 141; *Evans v. Evans*, 15 *Pa.* 572. However, it has universally been held that a husband cannot testify for wife when the suit concerns her separate estate. *Berlin v. Contrell*, 33 *Ark.* 611; *Palmer v. Henderson*, 20 *Ind.* 297.

**WRONGFUL DEATH—ACTION BY NON-RESIDENT ALIEN.**—*ATCHISON, T. & S. F. R. R. CO. V. FAJARDO, ET AL.*, 86 *PAC.* 301.—*Held*, that non-resident parents can recover for death of son under Kansas statute, *Code Civ. Proc.*, Section 422, granting right of action to personal representative for wrongful death of the deceased if the latter could have maintained an action had he lived.

Unless the statute in plain terms excludes non-resident beneficiaries they are entitled to sue as if they were residents. 8 *Am. & Eng. Ency. of Law*, 905. An administrator appointed in Colorado can sue for wrongful death in Kansas. *Kan. Pac. R. R. Co. v. Cutter*, 16 *Kan.* 569 (1876). Resident of Missouri can recover for wrongful death of husband, a resident of Missouri, in Kansas. *Chicago, R. I. & P. R. R. v. Mills*, 57 *Kan.* 687 (1897). Similar statute entitles resident of Italy to bring an action. *Pittsburgh, C. C. & St. L. R. v. Naylor*, 73 *Ohio St.* 115. A non-resident alien can bring an action for wrongful death. *Szymanski v. Blumenthal, et al.*, 52 *Atl.* 347 (Del.); *Alfson v. Bush Co.*, 75 *N. E.* 230. A resident of another state can sue. *Denick v. Central R. Co.*, 103 *U. S.* 11; *Higgins v. Central New Eng. & W. R. Co.*, 24 *N. E.* 534; *Jeffersonville, Madison, etc., R. Co. v. Hendricks, Admr.*, 41 *Ind.* 48. Exemption to "every person who has a family" may be claimed by a non-resident. *Spreul v. McCoy*, 26 *Ohio St.* 577. A statute purporting to apply to everyone may be taken advantage of by non-resident aliens. *State v. Smith*, 12 *Pac.* 121.



## REVIEWS.

*The Law of Carriers.* By Dewitt C. Moore of the New York Bar. Matthew Bender & Co., Albany, 1906. Law canvas. Pages 1171.

The author of this work is no stranger to the legal profession at large. The prominent part which he took in the preparation of Nellis' treatise on "Street Railroad Accident Law" brought his name prominently before the public and compelled his recognition as a legal writer of no mean ability. In the preparation of the work under discussion the author was actuated, as he says, by the desire "to furnish suitors with a practical guide in this class of legislation by as full a presentation as possible of the established principles and rules governing the various and varying phases in which controverted questions have been and may be presented for judicial adjustment."

It is perhaps fortunate that the success of the venture does not rest entirely upon its literary value and its recognition as a contribution to legal literature. In no sense can it be called a literary masterpiece. The text constitutes but a small proportion of the book and consists apparently of a sort of digest of the various decisions affecting this branch of the law arranged in narrative form. There is almost a complete absence of original theories and in comparatively few cases has the author departed from the rules laid down in the cases and advanced ideas and suggestions of his own. As a work of reference the book is, however, no less valuable on this account and does undoubtedly furnish a clear and concise statement, in most cases, of the holdings of various courts on any particular subject connected with the law of carriers. A surprisingly large number of cases are cited, about nine thousand in all, including substantially all the recent cases of any importance illustrating the principles and rules adopted by the English and Canadian courts as well as by the American in regard to this subject.

A comparatively short chapter, considering the relative importance of the subject, is given up to the discussion of Interstate Transportations and a presentation of the important decisions of the courts upon this branch of the subject. In only a few instances has the author attempted to foretell the probable attitude of the courts in regard to the Railway Rate Act the text of which is given in the succeeding chapter. Following the Rate Bill there is an index of remarkable completeness which should prove of great assistance in determining the law upon any particular phase of the subject.

The subject of carriers, their duties and obligations, their rights and privileges is daily becoming of greater interest particularly that branch involving Interstate Transportation. A work like the one under discussion comprising within a com-

paratively limited compass an exhaustive and interesting discussion of the whole field of Carriers should at once become popular with the members of the profession who wish to economize their time.

J. M. F.

*Railroad Rate Regulation*, Joseph Henry Beale, Jr., and Bruce Wyman, William J. Nagle, Boston. Buckram. 1179 pp.

Though the regulation of railroad rates does not occupy the center of the congressional stage at the present time, the subject is by no means a dead one. The last word has not been said. The legal profession will welcome the contribution by Professor Joseph H. Beale, Jr., and Professor Bruce Wyman of the Harvard Law School to the literature on the subject which already exists. The authors are firm believers in governmental regulation, the more conservative of the two alternative remedies, governmental regulation or governmental ownership, which have been suggested by those who have discussed the problem. Congress by the Federal Railroad Rate Act of 1906 emphasized the importance of the question and removed many of the obstructions from the path of proper regulation, thereby taking a long stride towards solving the problem.

The first part of this treatise is devoted to a somewhat general discussion of those general principles of the law which govern public service corporations. Particular attention is paid to those rules which concern common carriers and which are closely associated with the rate problem. The decisions which deal with the rate question as applied particularly to railroads are few in number and very recent, for it is only recently that this branch of the law has become important. It has been found advisable, therefore, to select as authority cases which settle the law regarding the rates of such public service corporation as water and gas companies. The doctrines involved in all these cases are the same, for they all concern public service corporations. Because of the paucity of the decisions which treat directly the matter of railroad rates the authors have made extensive quotations from them, since this appears to be the best way to acquaint the student with the present rules and the lines along which the existing doctrines will probably develop.

The second part of the work considers the Regulation of Railroad Rates According to Common Law Principles.

The third part of the work treats the Regulation of Railroad Rates by Legislation.

A fully annotated text of the Interstate Commerce Act with the citations of the decisions of the Commission and of the Courts is given in the appendix. Also the legislation of the States on the subject is given. The Rules of Practice before the Commission and the set of improved forms are valuable parts of the work. Undoubtedly this treatise is a pioneer in this field of law. Many books have dealt with the economic aspect of the problem, but none has been devoted exclusively to the legal phase of the question.

C. H. H.

## ACKNOWLEDGMENTS.

LAW OF NUISANCES. Joseph A. Joyce and Howard C. Joyce. Matthew Bender & Co., Albany, N. Y. Buckram. Pages 972. *Review will follow.*

RAILROAD RATE REGULATION. J. H. Beale, Jr., and Bruce Wyman. William J. Nagel, Boston, Mass. Buckram. Pages 1285. *Review Supra.*

MOORE ON CARRIERS. Dewitt C. Moore. Matthew Bender & Co., Albany, N. Y. Buckram. Pages 1171. *Review Supra.*

SUPPLEMENT TO SNYDER'S AMERICAN INTERSTATE COMMERCE ACT AND FEDERAL ANTI-TRUST LAWS. William L. Snyder. Baker, Voorhis & Co. Law Canvas. Pages 234. *Review will follow.*

FEDERAL RATE BILL IMMUNITY ACT AND NEGLIGENCE LAW OF 1906. Annotated by F. N. Judson. T. H. Flood & Co., Chicago, Ill. *Review will follow.*

THE AMERICAN LAWYER. John R. DosPassos, N. Y. Bar. Banks Law Publishing Co. Buckram, Pages 190. *Review will follow.*

## SCHOOL AND ALUMNI NOTES.

The John A. Porter Prize, of the value of two hundred dollars, established by the Kingsley Trust Association in 1872, is offered for the best English essay on a prescribed subject.

This prize is open to competition by any member of the law department who has been, since the commencement of the current university year, pursuing a regular course, either graduate or undergraduate, for a degree.

Essays for the John A. Porter Prize should be plainly marked on the outside, "John A. Porter University Essay for 1907," and should be mailed addressed to the John A. Porter Prize Essay Committee, Drawer 175, New Haven, or left at the office of the *Yale Alumni Weekly*. Each essay must be typewritten and signed by an assumed name and accompanied by the author's real name in a sealed envelope. This envelope must also contain an assignment of copyright, forms for which can be secured at the office of the *Yale Alumni Weekly*. The essays are due on or before April 30, 1907. The subjects for essays in 1907 are as follows:

1. "The Political Novel in Modern Literature."
2. "The Court of Star Chamber; its Service to Liberty."
3. "Possibilities of Popular Journalism."
4. "The Individual and the Corporation: a Study in Responsibility."
5. "Socialism in the United States."
6. "Government Control or Ownership of the Railroads—Which?"
7. "Christian Science."
8. "Latest Conclusions in New Testament Criticism."

The course on Quasi-Contracts, with Keener on *Quasi-Contracts* as a text-book, began January 14th. This course, which has been recently added to the courses of instruction of the First Year Class, is under the direction of Professor Watrous.

Members of the Third Year Class are reminded that every candidate for a degree is required under the rules of the school to try at least one Moot Court case during his connection with the Yale Law School.

Contrary to hopes and expectations Dean Rogers was unable to resume his class work at the beginning of the present term, not having fully recovered from his recent illness. It is expected

that Dr. Rogers will be so far recovered as to be able to attend to his class-work about the beginning of February.

Hon. George L. Peck has been selected as the Storrs lecturer for the course given in 1907.

'81.—Livingston W. Cleveland, who for twelve years has been Judge of the Probate Court for New Haven and who declined a re-nomination to that office, has resumed the practice of law in New Haven.

'84.—Albert Morris Thomas died in New York City, December 12th last. Until recently he had practiced law in Buffalo, N. Y., where he held a clerkship in the municipal court. He came to Yale from Fisk University from which he graduated in 1882. He leaves a wife and six children.

'89.—Edward G. Buckland has been elected vice-president of the New York, New Haven & Hartford Railroad Company and will locate in Providence, R. I., as executive representative of the company for all the departments owned, operated or controlled in the state of Rhode Island.

'93.—John Q. Tilson was on January 9th selected by the Connecticut General Assembly as the Speaker of that body for the session of 1907-1908.

'94.—Albert C. Baldwin has been elected clerk of the Connecticut Senate.

'95.—President Roosevelt sent to the U. S. Senate December 11th the nomination of Herbert Knox Smith, of Hartford, Conn., as Commissioner of Corporations, to take effect on the appointment of James R. Garfield, now head of that Bureau, as Secretary of the Interior.

'95.—H. W. Hawley's new address is 27 Hough avenue, Bridgeport, Conn.

'96.—Joseph C. Sweeney, who has been acting as trial counsel for the New York, New Haven & Hartford Railroad Company, at Providence, R. I., was recently appointed as attorney of that company, reporting to Vice-President Buckland. Mr. Sweeney will be located at Providence, R. I., as heretofore.

'99.—Charles R. Russell has withdrawn from membership in the law firm of Atwater & Cruikshank to become assistant attor-

ney of the New York Telephone Company and treasurer of the Empire City Subway Co. His address is 15 Dey street, New York city.

'99.—Charles H. Garnett has changed his address to Hugo, Okla., where he has located permanently for the practice of law.

'01.—A son was born on December 10, in New Haven, to Mr. and Mrs. Charles Anthony Fulton-Phizenmayer. He has been named Charles Anthony, Jr.

'92.—Chandler W. Durbrow is with the law department of the Southern Pacific Company, San Francisco, Cal.

'92.—The marriage of Miss Ethel Scott Gay, daughter of Mr. and Mrs. Edward Scott Gay, of Atlanta, Ga., to Phillip H. Kunzig, took place Tuesday, January 8th, at All Saint's Church, Atlanta.

'02.—Henry G. Snyder has established his law offices at 138½ West Main Street, Oklahoma City, for the practice of coporation, commercial, real estate and insurance law in the courts of Oklahoma and Indian Territory.

'03.—Fay R. Moulton was recently elected a member of the executive committee of the Yale Alumni Association of Kansas City.

'03.—Henry J. Patton has been admitted as a general partner in the law firm of Crawford, Dyer & Cannon, 1 Nassau street, New York city.

'04.—Charles D. Francis, who has been practicing law in St. Louis, has removed to New York and is practicing his profession in that city. His address is the Yale Club, 30 West 44th street, New York.

'05.—George Burwell Ward was married in New York city, January 1st, to Miss Bernice Rockwell.

'05.—Lon K. Wisehart of Los Angeles, Cal., is investigating for a number of property owners the project of spending \$50,000,000 for a water-power plant for the city of Los Angeles.

'05.—Edward A. Donohoe, formerly with the law firm of Hurburt, Jones & Cabot, begs to announce that he has opened an office for the general practice of law in the Proctor Building, 31 Exchange street, Lynn, Mass.

'05.—Ernest L. Averill, formerly of the firm of Averill & Cressy, has entered the law offices of Chase & Woodruff, at New Haven.

'05.—Warren F. Cressy, formerly of the firm of Averill & Cressy, New Haven, has entered the law offices of Fessenden & Carter, at Stamford, Conn.

'06.—Matthew Walton, Emmett M. Dickson and Matt. S. Walton have formed a partnership for the general practice of law with offices in the Security Trust Building, Lexington, Kentucky, and the Elks Building, Paris, Kentucky.

'06.—Robert L. Nase is with the law department of the Aetna Insurance Company of Hartford, Conn.

'06.—The engagement is announced of J. N. C. Campbell to Miss Marion Moulton of Hartford, Conn.

'06.—John M. Cates is with the South Bend Plow Company, at South Bend, Indiana.

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## MARRIAGE IN ROMAN LAW.

TRANSLATED FROM THE ORIGINAL FRENCH TEXT BY ANDREW T. BIERKAN, D. C. L.; EDITED BY CHARLES P. SHERMAN, D. C. L., INSTRUCTOR IN ROMAN LAW, YALE LAW SCHOOL

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Monogamy was, among the Romans, a traditional custom, ordained by the positive law: *Neminem, qui sub ditione sit Romani nominis, binas uxores habere posse vulgo patet, cum et in edicto praetoris huiusmodi viri infamia notati sint. Quam rem competens iudex, inultam esse non patietur.* (Cod. 5, 5, 2.)

In Roman Law, marriage is a status created by a simple private agreement. Its validity results from this understanding and is absolutely independent of the betrothal which ordinarily precedes, of physical cohabitation (*nuptias non concubitus, sed consensus facit*, says Ulpian in the *Digest*), of the festivities or of the religious ceremony by which it may be accompanied; it is finally independent of any settlement which confirms the pecuniary terms of the union and serves as its evidence. However, according to the opinion of many authors, Roman marriage, even of the last period, was never formed simply by the mere exchange of consents; it presupposed a mode of living characterized by public acts of various kinds. That the concordant wills alone did not suffice is, in the first place, shown by the fact, that marriage may take place outside of the presence of the future husband, providing the bride should be brought to his house; finally, and above all, it could not take place in the absence of the bride, since in this case she could not possibly be at the husband's disposal. "It is an old controversy," writes Friedberg, whether the *deductio in domum*, was an essential of marriage or only ranked as a proof of the matrimonial tie, and consequently constituted an optional ceremony. Both views have been advocated, yet, according to the better opinion, the ceremony of the



*deductio in domum* was only an optional one. However, the sole fact of its being questioned represents the ceremony as a result of an old custom never omitted, whatever the parties might have thought about its legal value."

On the other side, according to the French jurist, Ortolan, Roman marriage ranks amongst the *real contracts*; it has no existence, if not accompanied by a *traditio*.<sup>1</sup> Then arose in Roman Law, as in all similar systems, the difficulty: how to distinguish marriage from an irregular union, in its two forms of *concubinatus* and mere *concubinage*. The answer was that marriage implied the intention of the husband to have a legal wife, to raise her to his rank, to make her his equal, and the corresponding intent of the wife; this was called the *affectio maritalis*. So is explained the famous Roman definition of marriage, which shows how much the Roman wife shares the religious and civil status of her husband: *individua vitae consuetudo, consortium omnis vitae, divini atque humani juris communicatio*.

The quality of rank between the parties was, in the aristocratic society of Romans, the peculiar characteristic of marriage. Through this essential element it was made distinct from a mere cohabitation. In modern society on the contrary, marriage being either indissoluble or dissoluble in certain exceptional cases, its characteristic is permanency, a perpetuity complete or relative, which distinguishes and severs the legal union from any irregular cohabitation.

The Roman law recognized two kinds of marriages:

1) *Ex jure civili*, that is, the *matrimonium justum* (Gaius, I, 76), *legitimum* (Dig. I, 5, 24), *jure contractum* (Ulp. V, 10); in other words, the *justae nuptiae*; they alone producing the civil effects of marriage.

2) *Ex jure gentium*, that is, the *matrimonium injustum* or *non legitimum*, contracted between persons not possessing the *conubium*.

In such case, the children followed the condition of the mother and the wife never became *uxor*. Marriage was equally unlawful, in the absence of the paternal consent, but Paulus informs us that these marriages were nevertheless indissoluble. Public order and general interest were the reasons for maintain-

1. Paul-Frederic Girard, *Manuel élémentaire de droit romain*, p. 151, (4th edit.); Friedberg, *Das Recht der Eheschliessung in seiner geschichtlichen Entwicklung*, p. 5; Ortolan, *Le mariage, chez les Romains, était-il formé par le seul consentement des parties ou par la tradition de la femme?* *Explication de la loi 66 du Digeste, de donationibus inter virum et uxorem. Thémis* s. v. X., p. 496.)

ing their validity (*Sent.* lib. 19, § 2). Absence of the paternal consent was therefore a purely prohibitive impediment, if this expression may be used in Roman law.<sup>2</sup> The term *justa uxor* can have two meanings: sometimes as synonymous with *legitima*, sometimes as synonymous with *solemnis*. Wives *sine aqua et igni* are *legitimae*, but they are not *justae* under the operation of the ceremony. They are then *justae* in the first sense, but not in the second.

Actual marriage was indicated by three different expressions. First, *conjugium*, that is, a mutual engagement *quasi commune jugum*.

Second, *justae nuptiae*, the nuptials, from *nubere*, an expression which recalls the veil with which, during the ceremony, the bride concealed her modesty from the eyes of the curious.

Third, *matrimonium*, a term which summarizes all the philosophy of marriage, in recalling to the married couple their respective duties (*matris munus*).

Would you know, says Quintilian, what we call the nuptials? See this young girl whom her father has given to her husband and who walks in festive apparel, surrounded by the crowd. (*Declam.* 306.)

From *matrimonium*, we should distinguish; First, *concubinatus*, a union authorized under Augustus from the *leges Julia et Poppia*, between persons of unequal condition, provided the man had no *uxor*.

The *concubina* was neither *uxor* nor *pellex*, but *uxoris loco*.

The children, issue of such a union, are neither *legitimi* nor *spurii*, but *naturales*. (Cod. 5, 27.)

Second, *contubernium* is the perfectly regular and valid relation between a free man and a slave, or between two slaves.<sup>3</sup> Through the civil law, it produced all the effects arising from the natural law.

By an incestuous marriage is understood every marriage contracted contrary to the laws, which was punished by the confiscation of the *dos*.

"The incestuous marriage," says Paulus, "has no *dos*; this is because all gifts, even property acquired by increase, shall be confiscated. So the *dos* having escheated to the treasury on

2. The Romans did not recognize either actions in nullity of marriage or the distinction between destructive and prohibitive impediments. (Ch. Lefebvre, *Leçons d'introduction générale à l'histoire du droit matrimonial français*, p. 100.)

3. Édouard Cuq, *Les Institutions juridiques des Romains*, v. II, p. 90 et seq.

account of an illicit marriage, the husband was bound to pay to the treasury everything he would have been bound to return in the action of the *dos* except the necessary expenses which are ordinarily incurred on the same."

The Emperors Arcadius and Honorius confirmed these penalties to which they added others. They legislated that in such case the spouses should not make each other any gift and should not dispose by will except in favor of their children or of their ascendants, and in collateral line except in favor of their brothers, sisters, uncles or aunts. The Emperor Antoninus Pius says in a rescript: "If a senator has married a freed-woman, who, deceiving him, described herself as free-born, there should be granted to him against this woman an action analogous to a pretorian action, because the *dos* being null, there ought to be for her no advantage whatever." This is in accordance with the rescript of Valentinian, Theodosius and Arcadius.<sup>4</sup>

Whoever marries a relative in the direct line renders himself guilty of incest, according to the *jus gentium*.

Anyone who marries a relative in a collateral line, contrary to an express prohibition of the law, or even a relative by marriage, with whom he is forbidden to marry, is visited with a lighter penalty, if the union was contracted publicly,—with a penalty more severe, if it was clandestine.

The motive for this provision, adds Paulus, is that those who publicly violate the law deserve some indulgence, on account of the ignorance which is attributed to them, whereas those who break the law secretly ought to be considered as refractory and contumacious.<sup>5</sup>

The degrees of relationship are, says Gaius, either in direct line ascending or descending, or in the collateral line. In direct line ascending are the ancestors; in direct line descending, the descendants; in the collateral line, brothers, sisters, and their children.<sup>6</sup>

The direct line ascending or descending commences with the first degree, between father and son; but in the collateral line

4. For more details see Pothier, *Pandectes*, v. VIII, p. 447.

5. *Jure gentium incestum committit, qui ex gradu ascendentium, vel descendentium uxorem duxerit. Qui vero ex latere eam duxerit, quam vetatur, vel ad finem quam impeditur: si quidem palam fecerit, levius; si vero clam hoc commiserit, gravius puniatur. Cujus diversitalis illa ratio est circa matrimonium quod ex latere non bene contrahitur: palam delinquentes ut errantes majore poena excusantur: clam committentes, ut contumaces plectuntur.* Paulus, *lib. sing. ad Senatus-consultum Turpilianum*.

6. Gaius, *lib. I, ad edictum provinciale*.

there is no first degree, and it commences at the second, with the brothers.

First cousins are called *sobrini*, and their children *ex sobrinis nati*, having no special designation, take the name of the nearest relatives, and *id est eos qui ex sobrinis nati sunt, inter se proximum nomen appellare*.<sup>7</sup>

There is the sixth and last degree of relationship, which may include four hundred and forty-eight persons.<sup>8</sup>

Anciently, the *paterfamilias* might dissolve the marriage of his son or daughter, *alieni juris* and married *sine manu*. Antoninus Pius directed the magistrates to intervene in persuading the father of the family not to abuse his right. Diocletian finally took a more radical measure, and granted to the husband an interdiction *de uxore exhibenda*, to compel his wife to return to the conjugal domicile.<sup>9</sup>

Progress is now realized by these measures designed to protect married people against the excesses of the *patria potestas*. Paulus exerts himself to justify this blow at the paternal power, invoking once more public interest: "*Contemplatio enim publicae utilitatis privatorum commodis praeferitur*."<sup>10</sup>

Already at the time of Plautus, about the year 200, began an agitation in favor of equality of rights between husband and wife. Syria complains in these words: "If a husband has had a clandestine connection with a prostitute, his wife, if she knew of it, has no right of complaint; but if the wife secretly leaves, for a short time, her husband's house, he can bring against her an action for divorce. Why this inequality in the law?" (*Plauti Mercat.* iv, 6.)

In surveying the emancipation of the Roman wife, we find an evolution due to progress of manners and customs, to new ideas generally.

At last, free marriage leads to a wife being entirely independent from her husband; she does not become a member of his family, although having abandoned her own; the only tie between both parties is simply cohabitation.<sup>11</sup> In former times the tie was too strict, now it is relaxed beyond measure. It was re-

7. Paulus, *lib. sing., de Gradibus*, § 18.

8. Pothier, *Pandectes*, v. XV, p. 387.

9. É. Cuq, *op. citat.*, v. II, p. 98.

10. Ch. Lefebvre, *op. citat.*, p. 158.

11. d'Olivecrona, *Précis historique de l'Origine et du Développement de la Communauté des biens entre époux*. *Revue historique de droit français et étranger*, v. II, 1865, p. 184; Ginoulhiac, *Histoire du régime dotal*, pp. 53-65; De Fresquet, *De la manus en droit français et étranger*, pp. 142-143.

served to Christianity to find the true principles of union between husband and wife, equally removed from the rigor of ancient Roman society, and from a later excessive relaxation.

#### I. JUSTAE NUPTIAE.

In ancient Rome, legal marriage was a solemn rite having its particular forms; *confarreatio*, a religious ceremony, *coemptio*, a purely civil ceremony. But these ceremonies which had constituted at the beginning the forms of marriage itself, served later only to acquire the *manus*, and the *justae nuptiae* might take place without them.<sup>12</sup>

When Christian ideas began to prevail, marriage was the least formal of contracts. There was ordinarily a nuptial ceremony, some rejoicings (*nuptiarum festiuitas*), a promenade in public with music and singing (*deductio puellae in domum mariti*), sacrifices and prayers. But these public ceremonies were not essential to the validity of the contract; the law was regardless of the form and the celebration; custom supplied them. The marriage (*nuptiae*) was *justae*, that is, regulated by law only as to its effects and to the capacity of the parties.<sup>13</sup>

At Rome, marriage remained a private legal ceremony, and the efforts of the imperial power to transform it into a public one would have doubtless remained vain, had the Christian church not taken upon itself the task of regulating matrimonial law. One must proceed to the time of Justinian to find, in the civil law, Christian ceremonies, and then it is by way of a suggestive rather than an imperative manner.

In modern law, the peculiar character of marriage, which distinguishes it from concubinage, is its obligatory tie, its indissolubility; a union which is not made with the intent to be dissolved at the free will of the parties; from its nature, it is the voluntary union for life of one man and one woman to the exclusion of all others. (*Hyde v. Hyde*, 4 Swab. and Trist. 80.)

At Rome, no one married to procure a faithful wife; divorce being free, it took place without procedure, without judgment, by mutual consent; it might even become effective under the name of *repudium* by the will of one party alone. The *justae nuptiae* were as fragile as the *concubinatus*.<sup>14</sup>

12. See É. Stocquart *Aperçu de l'Évolution juridique du Mariage*, v. I, pp. 11-16.

13. *Nuptiae* comes from the custom which brides observed of veiling themselves when they were brought to the groom: "*Solebant enim veteres sponsas, quas adducebat, sponso, pudoris gratia obnubere.*"

14. Planiol, v. I., pp. 242 (4th edit.); Gide, *Étude sur la condition privée de la femme*, p. 551. (2nd edit.)

Paganism did not have as elevated a conception of matrimony as Christianity; if polygamy was prohibited, nevertheless concubinage was indulged and permitted.<sup>15</sup>

Marriage was indissoluble, in the sense only that one could not contract it for a certain number of days or years, within terms of cancellation and rescision. The rigid manners of the ancient Romans had, it is true, sanctioned the indissolubility of marriage much more than the law, and it is this which has led certain authors to hold that, in the first centuries of Rome, marriage was indissoluble.<sup>16</sup>

The union seems to have had a double object, first, to establish between husband and wife, perfect equality of rank, of condition and of dignity, *honor, dignitas*; <sup>17</sup> it is this which distinguishes it precisely from *concubinatus*, called as well *inaequale conjugium*. "*Ubi tu Gaius, ego Gaia*," says the wife, in passing over the threshold of the conjugal home. From this act, she entered into the family of her husband, where she became *materfamilias*; she left the domestic gods under which she was born to adopt the worship of the gods of her husband.

Another object of Roman marriage, the most important, was the propagation of the species; hence the well-known formula: *uxorem ducere liberorum quaerendorum gratia*. To become a father, seemed to the Romans the motive and justification of marriage; it was a public and a sacred duty.<sup>18</sup> However they did not consider marriage as the fundamental basis of the family, it was only a secondary regulation.<sup>19</sup>

If Cicero affirms *prima societas in conjugio est*, adding that marriage is the source of the Roman State, and, as it were, the nursery of the Republic,<sup>20</sup> it is not less true that the Roman family did not find its basis either in blood or in nature, it took

15. Concubinage seems to have passed from the customs of the Greeks into those of the Romans. (Zachariae, *Histoire du Droit privé gréco-romain*. *Revue historique de droit*, v. II., 1865, p. 562.)

16. See on this point, Picot, *Du mariage romain, chrétien et français, considéré sous le rapport de l'histoire de la philosophie, de la religion et des institutions anciennes et modernes*, pp. 36-93.

17. Otto Karlowa, *Römische Rechtsgeschichte*, v. II., p. 181 (Leipzig, 1892); Planiol, v. III., p. 2; C. Schmidt, *Essai historique sur la société civile dans le monde romain et sur sa transformation par le christianisme*, p. 33.

18. De Richécour, *Essai sur l'Histoire de la Législation des formes requises pour la validité du mariage*, p. 8 (Paris, 1856), Gide, p. 170.

19. Ch. Lefebvre, *op. citat.*, p. 46.

20. Cicero, *De Officiis* (Book I., 17): "*Prima societas in ipso conjugio deinde una domus, communia omnia. Id autem est principium urbis, et quasi seminarium reipublicae.*" On the value of this work of Cicero, G. Ferrero, *Grandeur et décadence de Rome*, v. III., pp. 134 et seq. (2nd edit.

its origin and its existence in the artificial tie of the *patria potestas*.

This prevailing source of the *patria potestas* led the Romans to establish two systems of *justae nuptiae*:

(a) The marriage *cum manu*.

(b) The marriage *sine manu*.

These two kinds of conjugal unions coexisted during several centuries, down to the early Empire.

Hence two kinds of lawful wives:

First, The *materfamilias*, who becomes a member of the new family, but only so far as she breaks all her former ties.

Second, The *matrona*, who, remaining a member of her own family, retains her gods, her own property, merely leaving her father or her agnates.<sup>21</sup>

(a) Marriage *cum Manu*.

This is the only marriage in which ceremonial formalities, being a legal requisite, were employed; *confarreatio* and *coemptio*. To these two kinds we should add *usus*. "*Olim tribus modis in manum conveniebant*," says Gaius (i, 3), "*usu, farreo, coemptione*." Through these forms of marriage, the woman entered into the family of the husband, and was submitted to a power, existing under the name of *manus*, which ought not however to be confounded with the modern marital power. In reality, this power pertained entirely at first to the father of the husband, and did not come to the husband himself, until he became head of the family and able to enjoy at the same time the *potestas* of his children. The wife became, by the civil law, daughter of her husband; she entered into his family, as agnate and as cognate: *In familiam viri transibat, filiaeque locum obtinebat*. (Gaius, i, 3.)

Here is an extraordinary juridical status,—the wife is represented as daughter of her husband and sister of her own children.

Let us add that the wife *in manu* had no right to divorce her husband, in case of marriage by *confarreatio* or *coemptio*; but, when married *solo consensu*, she was entitled to send the bill of repudiation.<sup>22</sup>

"This severity of law," says Troplong, "did not hinder the customs from making kind husbands, and scolding and wilful wives. In the comedy of *Casina*, Plautus introduces in a scene a jealous wife, who overwhelms her husband with reproaches and invectives." (Act II, Scene III.)

21. Troplong, *Du Contrat de mariage*, v. I., p. 13 (Paris, 1850).

22. Pothier, *Pandectes*, v. IX., p. 163.

Here then, is an institution which attracts the attention by its characteristic of great rigor. The husband becomes the judge of the wife, he may alone, in the earlier times, later, in a domestic tribunal where his relatives are called, condemn her to death. He is master of her person and of her property, almost, as if conquest had put her into his hands; terrible reminiscence of the rape of the Sabine virgins.<sup>23</sup>

(b) Marriage *sine Manu*.

This is the reaction, but excessive in its turn, against the severe exaggeration of the *manus*. Disagreeable experiences early befell the lot of women placed in absolute dependence. Their eyes were opened to the inconvenience of this position, and ingenuity was displayed to preserve the wife against this absorption and this abuse of power in the family of the husband. The text of the XII Tables, which anticipates the means of interrupting the *usus* in order to avoid the *manus* itself, seems to fully prove that then already began the new practice in opposition to the *justae nuptiae*.<sup>24</sup>

So, in the earliest times, there were some *patres*, who, from paternal foresight and love, and some probably from selfishness, were desirous to avoid the *manus*, in order to keep their daughters under their *potestas* and their protection. From that time, the father entrusts his daughter to the husband only, retaining over her all his rights as head of the family, and consequently excluding all other ties.

The wife did not pass into the family of the husband; she retained entire her original *agnatio* and through it, her hereditary rights along with her own relatives; in other words, the wife remained independent from her husband and kept her own property. The latter had the burden and the expense of keeping his own family. He often received from his wife directly or through a third person, certain gifts and donations to keep up the establishment, and reciprocally certain rights might be vested in the wife. (*propter nuptias donatio*.)

But, even when the wife lost her own father, these *justae nuptiae sine manu* did not transform themselves into a conjugal association. Freed from the *potestas* and *sui juris*, the wife was released from all domestic authority. It is true that during a long time she remained toward her own family in a sort of secondary dependence, a kind of nonage of her agnates.

23. Troplong, *De l'Influence du Christianisme sur le droit civil des Romains*, p. 18. (Nouv. edit., par l'Abbé Bayle.)

24. Ch. Lefebvre, p. 70.



Gradually this nonage was weakened and disappeared by the working of new customs; the wife became too independent. Here is the cause of the loose morals of the day. Nothing was left of the rigid system ruling ancient Romans, except the *dos* to which they added later, the prohibition of gifts between husband and wife.

(c) Ceremonies.

It is necessary to make clear the distinction between the obligatory ceremonies, legal formalities, and the ceremonies both religious and familiar, arising from custom, and I might say, almost from fashion. If we should confine ourselves to the texts we might imagine, easily, that the only formality of a marriage *solo consensu*, is an agreement, carefully drawn up between the fathers of the young people, with *datio* or *dictio dotis*. But in fact the betrothal had ordinarily preceded, accompanied by numerous presents, the feasts and the ceremonies both religious and family, completed by the *eductio in domum mariti*. For these usages, we have to read and peruse the books of authors who have dealt with the customs and private life of the Romans, and not legal works.<sup>25</sup>

Usually the *nuptiae* went on for three days. The second day was devoted to the signature of the dotal contract, and the *dos* itself was deposited in a temple, or sometimes in the hands of a priest, from whence it was reclaimed by the husband the day following the ceremonies. The third day the *eductio* took place, ordinarily after the setting of the sun and by the light of torches. The future wife was brought by her relatives to the house of the husband, where she received fire and water as a symbol of her new position.

Later, between Christians, a religious ceremony, often the nuptial benediction, came to be added to the ceremony at the conclusion of the civil contract.<sup>26</sup>

The Romans believed that not all days were favorable for the celebration of a marriage. They abstained from marrying on feast days, also on those days which a decree of the pontiff had declared unlucky days, such as the *Kalends*, the *Nones*, the *Ides*. The anniversaries of funerals of ancestors, the *dies parentales*, which were ordinarily celebrated in the month of February, appeared to them unpropitious, they were considered as unlucky or

25. Ch. Lefebvre, *op. citat.*, p. 308.

26. Troplong, *De l'Influence du Christianisme sur le droit civil des Romains*, p. 229; J. M. Antequera, *Historia de la legislación española*, p. 16 (4th edit.).

of bad omen. The month of May was equally considered an unlucky time. It was a common proverb, *mense malas maio nubere vulgus ait*, bad marriages are made in the month of May. The time considered auspicious, favorable, was after the *Ides* of June. As the *auspices* were consulted, the hair of the bride was adorned with garlands of flowers and with a spear. This custom of adorning the hair of the bride was an ancient custom, after the Vestals who bore this ornament, and supposed to be the privilege of a pure and chaste wife. Finally the bride was arrayed in a tunic of soft wool and covered with a veil of reddish color, *flammeum*, hiding her figure. When the evening came three children took her to the husband's house. At the door, which was decorated with branches of trees, she was asked what her name was. She replied that she was called *Gaia*. This name came, it appears, from the wife of Tarquinius, who was so virtuous that new wives all took her name, as being of good omen; they were accustomed to utter this ceremonious formula: "*Ubi tu Gaius, ego Gaia*," which signifies: where you shall be master and *paterfamilias*, I will be mistress and *materfamilias*. Then she adorned the door of the house with streamers of wool, after first anointing it with oil.<sup>27</sup>

This anointing once made, the bride entered into the house, but she had to take care not to touch her feet to the threshold of the door. She leaped over, or her companions willingly helped her to enter, by carrying her, not always through the door, but sometimes through an opening purposely made in the wall.

Once entered, she was given the keys of the house, she was placed on a sheepskin, and her husband received her for his wife in presenting to her water and fire; the water having been drawn from a pure source by a child of either sex; he sprinkled his bride with this water. Then five conjugal torches were lighted. The new husband gave a feast to the new wife and her companions. They called it the feast of rejoicing, *epulae geniales*. They sang and shouted *thalassio*, during which the conjugal bed was prepared in the chamber of the husband, the good spirit of which was invoked. The newly married couple were conducted thither, preceded by a torch which it was the custom for the friends of the newly married couple to take away with them. At the same time were borne the figures of several gods, in order that the marriage might be fortunate. Near the conjugal bed was a sort of tapestry suspended, consecrated to Priapus, rising by degrees, orna-

27. This in Latin is called *inungebat*; from it comes the word *uxores*, as one might say *unuxores*, those who receive the anointing (unction).

mented in ivory. The new wife went to sit there an instant to do homage of her virtue to this god. Then women companions placed her in the conjugal bed. They were women of recognized chastity, who had been married but once. Finally the husband detached the virginal girdle, the band of wool which the bride had worn up to this time.<sup>28</sup>

The day following the nuptials a new feast was given, and that day was called *repositia*, because they began anew to drink. On this day the new wife exercised the authority of mistress of the house, performed some religious ceremonies, and received presents from her relatives and friends.

#### (d) Second Marriages.

As we have already said, neither the pomp of the nuptials, nor cohabitation, was essential to a valid marriage.<sup>29</sup> However, between persons of superior rank, a contract was indispensable for entering upon the *justae nuptiae*.

As to second marriages, Augustus encouraged them, although punishing with infamy the widow who contracted new bonds within the ten months following the decease of her husband.<sup>30</sup> The reason of this prohibition was, following the forceful expression of Ulpian *propter turbationem sanguinis*, in order that confusion of blood should be prevented, and all the uncertainty resulting therefrom; but the widow might betroth herself during this period.

When Christianity arose, it did not condemn second marriages. St. Paul even advised them to young widows.<sup>31</sup>

Theodosius the Great, induced in this by the bishops assembled at the Council of Constantinople, extended the delay of ten months to a year, confirmed the penalty of infamy, but added thereto a new sanction, more efficacious. The woman lost the gains of her former marriage, she was not able henceforth to give to her second husband more than a third of her property, and became incapable of being the heir to the property of a stranger or a relative beyond the third degree. (C. 5, 9, *de secundis nuptiis*, l. 1.)

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28. When the marriage was made by *coemptio*, there were other particular ceremonies, well known. See Karlowa, *op. citat.*, Vol. II., p. 158.

29. Pothier, *Pandectes*, v. VIII., p. 383.

30. The year was originally of ten months among the Romans. Numa increased it by two months, but the time of mourning was not prolonged to the same period.

31. Troplong, p. 184.

The property constituting the gifts and profits of the former union was irrevocably assigned with a hypothecary lien, to the children of the former marriage, saving the right of usufruct in favor of the mother. Theodosius II and Valentinian II extended these provisions to the father who remarried.

Paulus informs us what was meant by mourning. "He who is in mourning, ought to abstain from feasts, from all rejoicings likewise from wearing purple and white colors." (*Sent.* §14.) However, in order to assist at funerals, the women were dressed in white, this color harmonizing with this ceremony, and used to enshroud the dead; but they afterwards resumed their black clothing.

The death of a betrothed carried no obligation to mourning, *sponsi nullus luctus est*, says Paulus.

By a constitution of Valentinian, of Valens and of Gratian, "a widow of less than twenty-five years of age, although emancipated, might not contract a second marriage without the consent of her father." (Cod. 5, 4, 18.)

By the same constitution, an adult minor after the death of his father married with the consent of his mother and his near kinsmen. (Cod. Theod., 3, 7, *de nuptiis*.)

"And if, on the choice of a husband, the mother does not agree with the near kinsmen, it is decided that (conformably to that which has been established for the marriage of daughters) to authorize the choice, he must have recourse to judicial authority; so that in a case where the competitors were both of the same birth and the same merit, the judge shall give the preference to the one to whom the mother had given consent."

"And finally, in order that the nearest heir of the widow might not oppose an honorable marriage, if there was any suspicion in this regard, we decree that the authorization and the decision shall be submitted to those who are called to intervene in their default and who cannot be heirs." (Cod. 5, 4, 18.)

Honorius and Theodosius alike say, "Maidens consecrated to the divine service cannot marry at all without the consent of their fathers, nor a girl who has the free exercise of her rights, unless over twenty-five years of age. If she no longer has a father whose consent is required, she shall have to apply to her mother or a next of kin; but in case of death of her father and mother, and her kinsfolk, the judge will decide who is a suitable husband." (Cod. 5, 4, 20.)

According to the opinion of Professor Charles Lefebvre, the *iustae nuptiae* may be considered as one of the most imperfect in-

stitutions of classic law, an error made by the Romans in their conception of the true notion of the relation between husband and wife. (Lefebvre, p. 169.)

## 2. MATRIMONIUM JURIS GENTIUM.

A legal marriage could not be contracted except between Roman citizens enjoying the rights of *connubium*. However, the inevitable and necessary intercourse with the *peregrini* compelled the Romans to regulate unions with some other persons. Such a marriage was not a *justum matrimonium*, but neither was it a concubinage. They called it *matrimonium injustum, non legitimum*, or *matrimonium juris gentium*.

Children of such a union had a recognized father in the legal sense of the word. Nevertheless, they were not *justi liberi* and they followed, in virtue of understood principles, the condition of the mother. So a *peregrina* mother gave birth to *peregrini* children; if, on the contrary, she was a Roman citizen, her children became Roman citizens.<sup>32</sup>

From the time of Caracalla, there was no more question of a marriage *juris gentium*. Every valid marriage constituted a civil marriage *justae nuptiae*, a *justum matrimonium*.<sup>33</sup>

At the time of the Romans, the inhabitants of a country conquered by arms and converted into a province, such as Spain, were called *Provinciales*; they did not participate in any of the privileges of the citizen; they had neither the *connubium* nor the paternal power, nor the honors, nor the priesthood, nor the suffrage. They were subject to Roman officers who had to rule them and to apply the provincial edicts.<sup>34</sup>

In 212 Antoninus Caracalla virtually extended the quality of Roman citizen to all inhabitants of the Empire; this abrogated the Latin right. This step was taken in the interest of the Treasury,

32. Gaius, I., 56, 67, 80; Ulpian V. 8, 9.

33. Mainz, *Cours de droit romain*, §303.

34. The *ingenui* or free-born men who lived in Rome were Roman citizens; the others, non-citizens or *peregrini*. These were subdivided into *Latini*, *Italici*, *Provinciales*.

Roman citizens had particular rights, notably the *connubium*, the paternal power, the honors, the priesthood, the suffrage.

The *Latini* were anciently the inhabitants of *Latium*, and related to the Roman people. The principal of those rights was to be ruled by their own laws and their own magistrates. They might become Roman citizens.

The rights of the Italians were also given to some cities outside of Italy. The Italians had likewise their own magistrates and their own laws, but they could not possibly become Roman citizens.

Vespasian gave the Latin right to all Spain; *Universiae Hispaniae Vespasianus imperator Augustus jactatum procellis reipublicae Latium priduit*. (Pliny, *Hist. Nat.* III., c. 3, 30.)

and in no way moved by a liberal mind as one might believe; it gave an opportunity to lay a tax of five per cent on any succession whatever.

"*In orbe Romano qui sunt, cives Romani sunt*," writes Ulpian, "all those who live in the Roman empire are Roman citizens."

We remark, however, that the edict of Caracalla was not a general and universal law. The act only applied to the free-born. The Latin right continued to exist for all classes of the *Latini Juniani* down to the reign of Justinian. It was furthermore incompatible with the quality of Roman citizen, as every inferior condition is incompatible with the condition of a superior order. The edict excluded equally the barbarian mercenaries serving in the Roman armies, and the inhabitants of provinces conquered subsequently to its publication.<sup>35</sup>

As we have already said, marriages were strictly prohibited between the Roman official exercising a charge in a province, and the provincial who had her domicile there. An exception was made, however, in favor of an officer who served in his own country.

### 3. CONCUBINATUS.

With regard to marriage, the law separated wives into two classes; on the one side the *matrona* or *materfamilias*; on the other side, wives to whom that title was refused, those whom Horace called *in classe secunda*. (Satires i, ii, v. 94.)

In juridical language, the words *matrona* or *materfamilias* had a clear and precise meaning, exacting a two-fold condition for the wife; first, to have had a Roman citizen for a father; second, to have maintained an honorable and pure life, the dignity which her origin gave to her.

From that time, the Roman wife had the right to wear the white tunic with the long fold, the *stola*, the noble sign of the matron, as the *toga* is the noble sign of the Roman *quiritis*.<sup>36</sup> A veritable sacrilege was committed if this wife or virgin fell short in her duties and

35. Girard, p. 115 (4th edit.).

Ch. Mainz, *Cours de droit romain*, §54; Ch. Revillout, *Étude critique sur le jus italicum*. (*Revue historique de droit*, 1855, v. I., pp. 541-571.)

36. In early times women as well as men wore the *toga*, but later adopted a different robe called the *stola*, which was decorated with a wide border or fringe, *limbus*, which they called *instila*, which came down to the feet, from which the word *instila* is used for *matrona*. Over this garment they put another ample robe, similar to a mantle, which they called *palla* or *peplus*. The ancient interpretations of Horace attributed the same signification to the words *palla* and *instila*, and called the garment *peripodium* and *tunicæ pallium*.

It was prohibited to courtesans and to women condemned for adultery to wear the *stola*. (A. Adam, *Roman Antiquities*, v. II., p. 216, trad. Paris, 1818.)

sullied the sanctuary of her family. So, for her, concubinage was severely prohibited; it constituted a crime, a *stuprum*; while as to a woman of inferior class it was an indifferent fact in the eyes of the law. From this time, the demarcation between the caste of *matronae* and the inferior class does not give rise to any confusion.

In this second class were found all Roman women who had not Roman citizens for fathers; the slaves, the freed-women, perhaps also foreign women; finally those born of an irregular union and who had no legal father.

The law established also a very clear distinction between the *concubinatus*, the *justae nuptiae*, and the encroachment on the morals, the *stuprum*.<sup>37</sup> In ancient Rome, no sexual intercourse, except between husband and wife was allowed by law, except later between concubines: *stuprum committit, qui liberam mulierem consuetudinis causa, non matrimonii continet, excepta videlicet concubina.*" (*Modestinus*, Dig. 48, 5, 35.)<sup>38</sup>

No legal distinction separated a married woman from a concubine,—intent alone—yet in reality and in the course of daily life, the *uxor* and the concubine had no resemblance whatever, nor could they be easily confused. The distinction, wrote Paul Gide, seems as clear, as sharp-cut, in Roman society, perhaps, as it is in our days.

The constant publicity, really resulting from the *affectio maritalis*, from the *dignitas*, from the possession of this status, in a word, was sufficient for the Romans.<sup>39</sup>

The *justae nuptiae*, were, at Rome and in Italy, nothing but the marriage of a part of the population, of that which one might well call in our day the better class, the higher and ruling classes. The *connubium* was, however, not generally conceded in all the Empire, outside of the *cives Romani*. The *nuptiae* were for the few, and they remained forbidden between free-born and freed persons. Hence arose *concubinatus*; it was an earnest and acknowledged intercourse. In opposition to the *justae nuptiae*, there was no *dos*, neither any *potestas* over the children.<sup>40</sup>

37. P. Gide, pp. 554, 557.

38. P. Gide, p. 552; Otto Karlowa, *Römische Rechtsgeschichte*, V. II., p. 181; Planiol, v. III., p. 2.

39. Such was also, from 1665, the law of the colony of New York: "Every single person or persons who shall be found, or proved by confession of parties on sufficient testimony, to have committed Carnall Copulation, with a married man or woman, they both shall be grievously fined, and punished as the Governor & Council or the Court of Assizes shall think meete, not extending to Life or Member." (*The Colonial Laws of New York*, v. I., p. 21.)

40. Free marriage did not require any legal formality except a reciprocal consent. It encroached on the limits of concubinage. This reason gave place to the *dos* to distinguish the lawful wife from the concubine, but it is

This is why Plautus says in one of his comedies, the *Trinummus*, that it would be indecent for the head of a family to marry off his daughter or his sister without a *dos*, even to one who would not object to marry her so, because such a union savored rather of concubinage.<sup>41</sup>

The wife was distinguished from the concubine by the intention of the parties, *concubina ab uxore, solo dilectu separatur*.<sup>42</sup> This intent was shown either by an express declaration, or by the social condition of the couple. If, for instance, it concerned a free-born and honorable woman, she was reputed a wife, unless, by a formal declaration, the man had made known his intention to take her for a concubine. The will of the parties, or of one of them, put an end to the concubinage.<sup>43</sup>

The conditions of concubinage are puberty, consent of the parties and of the ascendant under the power of whom the man or the woman might happen to be.

We know of the restriction put by Antoninus Pius upon the power of the father sending the *repudium* contrary to the will of the parties.

As the father had power to dissolve concubinage, it has been assumed that he likewise had power to prevent its formation.<sup>44</sup>

There were a certain number of rules in common with marriage, notably the impediments based on relationship, affinity, and finally, on the conditions of morality itself. So a man who had been in a status of concubinage or of marriage with a woman, could not, after having left her, unite with a daughter of that woman by a second union. But, on the other hand, if a man and a woman, having, the one a son, and the other a daughter, of former unions, coming to marry, the union of the son of the one with the daughter of the other was not prohibited, even though there should be born of the second marriage of their respective parents, a child, who would be the brother of each of them.

An interest, wholly political, caused the prohibition to officials to marry a woman domiciled or born in the province where they exercised their functions. This prohibition seemed to prevent them from

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not to be concluded that it was one of the essential elements in the formation of the marriage. (Tropiong, *Du Contrat de mariage*, v. I., p. xx, (1850.)

41. Plautus, *Trinummus*, Act II., sc. 2, v. 93, 94.

42. Paulus, *Sentent.* lib. II., 20.

43. L. Domenget, *Institutes de Gaius*, p. 42 (nouv. édit.). On the controversy that the *matrimonium*, like the concubinage, required for its formation something other than consent, see Morillot, *De la condition des enfants nés hors mariage*, p. 70.

44. Paulus, *Sentent.* lib. V., tit. 6, 15—on the question, see Pilette, p. 322.



procuring in their provinces, by marriage, an influence from which the Capital might one day have to suffer, and to prevent the abuse which they might have made of their authority to compel rich families to ally with them. Nothing of the kind was to be feared if it was only a concubinage. The concubine had no *dos*; she belonged ordinarily to a family of mediocre condition, without influence in the country; and if, by accident, she belonged to a family of note, her relatives, little flattered by the attentions of the official, would not become very ardent partisans for him. This is why a fragment of the title *de concubinis* in the *Digest* formally granted to officials of a province their right to take a concubine.

It was forbidden to have several concubines at once; this would have been polygamy, contrary to Roman civilization. Likewise a man having a lawful wife, could not take a concubine; this would have been adultery and bigamy. If any audacious debauchee violated this law, public morality protested against such turpitude.

Tacitus reproaches Sophronius Tigellinus, commander of the night watch of Nero and of the Pretorians, with his infamous death in the midst of the embraces and kisses of his concubines. "He cut his throat and crowned the opprobrium of his life," wrote he, "by the tardiness and the ignominy of his death."<sup>45</sup>

Among illegitimate children, there were *naturales*, children born of a concubine; *spurii*, children born of a *meretrice*, *vel scorto et incerto patre*; children of an adulterous intercourse; and, finally, children of an incestuous intercourse, such, for instance, as the child of uncle and niece or the child of a union contracted with a Vestal.

Children of concubinage (*nothi*) were not bastards, but although they had a known father, they were not his lawful children. Born outside of marriage, they could not claim the advantages of the civil law; they could not succeed to their father, they did not bear his name, they were not members of his family. But, regarding the mother, they had the same rights of succession as legitimate children. Such was the logical consequence of the position assigned to the mother in the Roman family; there was no connection between her and the legitimate children except by ties of blood. There was nothing between them and her except a natural relationship, entirely similar to that of natural children. Beyond this, there could not exist any difference between a child of concubinage and one born of lawful marriage.<sup>46</sup>

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45. Tacitus, *Hist. lib. I., Cap. LXXII.*

46. Troplong, *op. citat.* p. 174.

It goes without saying, that children, issue of concubinage, did not receive the *jus liberorum* except as to their father and mother, for the peremptory reason that in the eyes of the law they had neither paternal nor maternal grandparents. For them, the family commenced at their father and mother; they could not, therefore, procure the right resulting from their birth except from their immediate parents.

(a.) NATURE OF THE INSTITUTION.

According to M. Planiol, the usual view of considering the *concubinatus* as a kind of inferior marriage, loses ground daily, which confirms the opinion of the late Professor Gide. Many authors presumed the *concubinatus* formed a legal tie giving rise to certain legal effects; they invoked the following sentence of Ulpianus; "*Etiam si concubinam quis habuerit sororis filia, licet libertinam, incestum committitur*" (*Digest* 23, 2, 56). "But," says M. Girard, "neither during the Empire, nor before, was the *concubinatus* a kind of a marriage; it was nothing else but a mere cohabitation. What leads to confusion, is the *lex Julia de adulteriis*, where adultery or the sexual intercourse with an honest woman were punished as *stuprum*, while the concubines escape all penalties." The words of Ulpian are evidence that from the time of Augustus, the institution was recognized by criminal law, and nothing more. From the time of Christian emperors it was known to civil law. (P. F. Girard, p. 183.)

(b.) LAWS OF AUGUSTUS.

Before Augustus, sexual intercourse, out of marriage, was either a *stuprum*, or a mere *fornicatio*, according to the woman; but from his time, concubinage did not involve any disgrace and the concubines escaped penalties.

Yet the concubine had no right to the honorable title of *materfamilias*; she did not participate in the honors of her husband, only sharing his bed, his table, and his affections; in former times described as *concubina*, she took now the more decent name of *amica*, a friend.<sup>47</sup>

Some men raised monuments to concubines, on which were inscribed their quality, without offending public sentiment; it happened even that on the same marble were inscribed the names of a wife, and then of a concubine who had taken her place.<sup>48</sup>

47. "*Nunc vero nomine amicam, paulo honestiore, concubinam appellari.*" Paulus, *Dig.* 50, 16, 144.

48. "*Concubina mei amantissima.*" Gruterus. *Inscriptiones antiquae* v. I., pp. 631, No. 5; 640, No. 8. (Amst. 1707, in fol.)

Gradually concubinage acquired a great extension; it especially served to throw the cloak of decency on loose unions of free and honorable Romans, who had no desire to be involved in too heavy ties. Often, after the death of his first wife, a widower chose an *amica*, in order to escape from burdens of a second marriage.

Poor plebeian women of obscure birth, freed slaves, were willing to live, under the name of concubine, in the company of a man desirous to avoid a *mésalliance*. During the whole Empire, most honorable men, emperors renowned for their virtue, lived publicly and openly in unions of this kind. The learned and virtuous Marcus Aurelius had a celebrated concubine; after the death of Faustina, in order not to give a step-mother to his children, he took for concubine the daughter of the procurator of the deceased empress. Another emperor, Vespasianus, having survived his wife and his daughter, kept as a concubine Caenis, a freed-woman.

The church, rigorous and inflexible with regard to heresies, and to sects which might compromise her supremacy, proved to be tolerant and moderate towards certain social institutions. Its leaders saw and realized the impossibility of transforming them too suddenly.

A Roman citizen had returned from Spain, leaving in that province a wife *enceinte*. He married again at Rome, and died, leaving two posthumous children, of the two marriages. The status of the second woman and of her child was contested. The question was raised whether, in order to break the first marriage a formal divorce was necessary, at least, a change of will and intention regularly manifested in a certain form of words (*certis quibusdam verbis*), and not merely the change of intention shown by the fact alone of the second marriage. It was on this occasion that Cicero remarked that if this question was adjudged against the second woman, she could not be treated otherwise than as a concubine, *in concubinae locum deduceretur*.<sup>49</sup>

The *jurisconsult* Marcianus thus had reason to say, "it is from the laws of Augustus that concubinage has received a name and a legal position, *concubinatum nomen per leges adsumpsisse*." (Dig. 25, 7, 3.)

Ancient usage did not permit a Roman citizen to espouse a freed-woman. (*Tit. Liv.* xxxix, 19.) So Cicero twitted Antony for being married to Fulvia, daughter of a freedman (*Plin.* ii, 2, iii, 6); and Antony was generally detested on account of his marriage with Cleopatra, a foreign queen, whom he married after the death

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49. Cicero, *De Oratore*, lib. I., Cap. XL.

of Fulvia and a short time before he united himself with Octavia. (Plutarch, in *Antonio*.)

The concubinage of the patron and his freed-woman was perfectly permissible. It was proper, they said, that he should make her his concubine rather than his *uxor*. But having become the spouse of her patron, the freed-woman could not leave him against his will, and if we are to credit Ulpian, she lost the right to be the concubine of another man.

A Roman citizen is guilty of *stuprum*, if he takes for concubine a free-born woman, who has remained virtuous and of whom he has not the *testatio* constitutive for her abasement. From necessity, Romans were inclined rather to hold to a *stuprum* than to a concubinage, when it was a question of a Roman woman and a man of inferior condition. The patrician woman who satisfied a caprice in abandoning herself for a time to any plebeian youth, was not considered as his concubine; she was less blamed than if she had become such.<sup>50</sup>

A senator could not marry, but might have for a concubine, a freed-woman, a woman whose parents appeared on the stage, a prostitute. A free-born man might unite in concubinage with an adulteress or a woman condemned by a public judgment, with an actress, or any other woman whom he could not have made *uxor*, on account of the humbleness or the disgrace of her condition.

The concubine was placed by the civil law immediately after the *uxor*; it was an unequal marriage which one might perhaps liken to the morganatic marriages practiced in Germany.

In *résumé*, there was nothing of disgrace or of infamy in the status of concubine, but as generally the man took a concubine from a class inferior to his own and did not raise her to his rank, less consideration was naturally had for this woman than for an *uxor*. Like the latter, she lived in the conjugal domicile, she was mistress of the house, but outside, the similarity went no further; the concubine never shared the honors nor the dignities of the man with whom she lived.

So, to take a concubine was an act which, even at Rome, one did not celebrate, because it was a sort of *mésalliance* or libertinage, and because for the outside world, the concubine was not a wife but nearly a servant. What constituted the status of *concubinatus*, was cohabitation by mutual consent.<sup>51</sup> At the beginning it was very easy to distinguish the concubine from the wife, on account of the cere-

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50. D. Pilette, *le Concubinat chez les Romains* (*Rev. hist. de droit français*, v. XII., pp. 329, 339).

monies which inaugurated conjugal life, and also because the concubine was always of an inferior social condition; often a female member of a *familia*, who was raised above the others. Whenever the public formalities were no longer customary for marriage, when Christianity had prohibited them like all the rest of the pagan worship, and when finally concubines were chosen amongst those whom they might have taken for wives, and inversely, it was no easy matter to make the legal distinction. The difference was even sometimes impossible to establish, since the same woman might change her quality without any public manifestation. The concubine and the wife are no longer distinguished, except by the intention with which they commenced their union.

(c.) LAWS OF CONSTANTINE.

The doctrines of Christianity did not allow that a man should subject to a humiliating inferiority the woman whom he had chosen for a companion. So all efforts of the Christian emperors tended to do away with the *concubinatus*. Constantine struck the first blow, but, displacing the responsibilities, he struck less those who contracted one of those unions henceforth illegitimate, than the children to be born, who were quite innocent of their parents' faults, and whom he classed with the *spurii*.

Starting from Constantine, concubinage ceases to be a union which the law protects; it is still not illicit, but it is no longer legal.

His successors gave more or less proof of the same inconsistency, the same lack of judgment. His first thought, it seems, was to convert concubinage into legal marriage, and to this end he granted legitimacy to the children born of such unions, and assured to them the same advantages as to children born in lawful wedlock, on condition that their father married his concubine. He created what is called in our days legitimation by subsequent marriage. He prohibited equally to persons high in dignity to live in concubinage. He attacked, in this way, the institution, by the three-fold influence of recompenses, penalties and public example. We note, however, that legitimation did not apply except to children of free-born concubines.

Leo VI, the Philosopher, abolished concubinage. Starting from his Novel 91, the children *ex concubinato quaesti* and those born of

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51. Some authors have held that concubinage did not result from consent alone, and that there had to be in addition the *ductio ad domum*, that is to say that the concubine ought to be put at the disposal of the husband, but this opinion has not prevailed. See, on this point, D. Pilette, *op. citat.*, 244, *et seq.*

criminal unions and of transient unions, are classed together. There are no longer, outside of children born in lawful wedlock, any except those *vulgo concepti*, governed by an unjust law.

Constantine had understood that the abrogation of the law was a necessary preliminary to the regulation of marriage. By suppressing the penalties against unmarried persons, he had substituted for the pagan system the Christian and truly moral system of liberty in marriage. Montesquieu has held that Constantine had no other object than to encourage continence. According to Troplong, the plan of Constantine was more extensive; he desired to attain a double end; to give dignity to a voluntary life of celibacy and to clearly define the matrimonial state.

Thus he overturned from top to bottom the memorable laws which the pagan emperors had considered the basis of their empire.

But all history demonstrates, and to this day has not ceased to demonstrate, that it is not enough for a legislator with good intent, in order to modify the organization of society, to try and wipe out, by simple decree, an institution which, during centuries, has been rooted in daily custom. No one can, by violence, alter the turn of mind and the usages of a people, especially when a legislator takes up daily, universal, familiar things. At this depth nothing can be forced upon society. The attempt meets obstacles of the same nature as violence itself,—physical obstacles of number and of space. The learned author, Dupont White, has remarked: "Force is helpless against ancient manners even when moved by the best intentions and the soundest policies. It is not exactly the law, which is invincible, but opinion, manners and customs." (*L'Individu et L'Etat*, p. xii, 3rd edition.)

Constantine failed to understand that the state can, in no way, give rise to progress of whatever sort, whether imposing or lending its power; the source of progress is elsewhere; we find it in predisposing circumstances, in a collaboration of men and things. Where is its heart and life?

Again, society was still full of paganism, which, neglected as a cult, remained in the manners and customs. Although Christian by faith the people were still pagan by civil and domestic habits. If the emperor himself was converted to Christianity, the great mass of the empire had not followed, yet remaining half pagan.

The gods had disappeared neither from the camps nor from the temples; but without overturning their altars, it was commenced in a careful manner to shut them up in their sanctuaries. The public worship of paganism remained permitted and even honored; to offend it too directly was avoided. Constantine always designated

it by this expression, a little disdainful, but polite: "*Vetus mos, preterita usurpatio*,"—the old custom, the ancient observance. He did not dare to banish entirely the official ceremonies.<sup>52</sup>

He continued to respect the immunities of the pagan priests; he continued even to preserve the title of the *pontifex maximus*; he perserved it with the insignia on several medals and inscriptions.<sup>53</sup> But notwithstanding the free scope given to the pagan religions, he strongly repulsed their immoral rites; he ordered to be demolished in Egypt and in Phoenicia the temples consecrated to an indecent worship, and dispersed by soldiers their infamous priests.<sup>54</sup>

The hesitation of the sons of Constantine concerning this worship (Christianity), shows how much, at the time of his death, the bulk of the people was still thoroughly pagan. Everything is contradictory in their acts, and consequently in the narratives of their historians. One day daring reconstructors, the next day intimidated by the phantom of the ancient institution and by the prejudices which surrounded them; now they advanced, then they receded; sometimes refusing to punish the child for the fault of the father, sometimes tolerating the scandal of concubinage. So, Valentinian I granted to natural children and to their mother the right to receive legacies from their father and husband; on the advice of the pagan Libanius this return to a rightful indulgence, but contrary to the then prevailing Christian doctrine, was also sanctioned by Valens.<sup>55</sup>

Now Valentinian III desired to repeal the law and to go back to the decree of Constantine, but Theodosius II would not accept it, unless with the concession made by Valentinian I. They tried then to preserve sanctity in the conjugal union, at the expense of the illegitimate children.

We may ask what was this invisible force in paganism which, discredited and ignored, continued nevertheless to raise its head above the current of opinion, and the ardent depositaries of an absolute power. It was great and persistent, for it was the force of the past in a society which had seen ten centuries of power and glory. A mixture of popular superstition, of political traditions, of social habits and of literary tastes, defended still against the invasion of new customs, the remains, solid and massive, even though broken, of the old religion. All Roman society was permeated with its mem-

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52. de Broglie, *L'Église et l'Empire romain au IV siècle*. v. I, pp 308-309; v. III., pp. 136-138.

53. Mionnet, *De la rareté et du prix des médailles romaines*. Paris, 1827, Vol. II., p. 226.

54. Euseb., *Vita Const.*, III., c. 55 et 58; IV., c. 25, p. 512, 514, 537.

55. *Cod. Theod.* 6, tit. 6, 1.

ories and its beliefs; the popular language, administrative, political or polite, was equally impregnated. The fields, the courts, the schools, abounded still with pagans, avowed or secret. The old tree, struck at the head, had not ceased to extend its strong roots under the soil. As it happens often to the vanquished, even adversity prepared new resources for the last pagans, in binding together their ranks and giving them union in their lack of power. It caused the survival in all ranks of Roman society, of this last feverish agonized excitement which caused it to take on for some time the appearance of resurrection.

In reality, two societies, very different, are present; the civil society and the religious society. As Guizot observed, "They differed not only in their object, but they were governed by different principles and institutions, paganism continuing to impose its laws and its customs."

Polytheism retained its roots in a soil more resisting than that of jurisprudence; it rested not on political morals, but on popular pleasures. This was its last, and for a long time, its inviolable asylum.

*Émile Stocquart, Jur. Dr.*



## CONCERNING CERTAIN PECULIARITIES IN THE REAL ESTATE LAWS AND PROCEEDINGS OF NEW YORK.

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Mr. William P. Fiero, President of the Bar Association of the State of New York, in his annual address several years ago declared that the real estate laws of New York including the practice in actions and special proceedings were the most cumbrous, complicated and expensive of all the states of the Union; and those of Connecticut the simplest, and he proposed various changes and amendments to lessen the incidental time and cost. I am not aware that any of the suggested reforms have taken effect but it is certain that foreclosure sales have been made more expensive in the city of New York with no advantage to anybody except the newspapers, by changes in the mode of advertising; and mortgage loans a little more troublesome and costly to the borrowers by changes in the mechanics' lien laws and tax laws. It is doubtful, however, if New York is much worse than New Jersey, although its practice has been from time to time rendered more uncertain by changes in the Code of Procedure. The reasons for some of its peculiarities will be found in its history.

New York was originally settled by the Dutch, and in parts of Westchester and Richmond counties by French Huguenots, and being from 1609 to 1664, and again in 1674, under the rule of Holland, the basis of its civilization and society was not Anglo-Saxon and many of its laws, customs and institutions were derived from the civil law and the continent rather than from England. A list of many such having no English origin or analogy and differing widely from English precedent will be found in that very learned work, "The Puritan in Holland, England and America," by Douglas Campbell. Among these are several now common to various of our states, and erroneously supposed to have been brought from England.

The registration or recording of conveyances is even yet very incomplete in that country, the transfer of real estate being accompanied by delivery of the title deeds. But in New York it has been in use from the earliest times.

When the records of the realty transfers in New York county were moved to the new Hall of Records in November, 1906, several

mortgage records were found dated in 1645.—(See *N. Y. Herald*, Nov. 28, 1906.)

Mr. Campbell shows how profoundly the character of the Pilgrim Fathers had been modified by their stay in Holland so that when they sailed from Delft Harbor they brought with them much new knowledge and many ideas changed from those which they had taken there, and the Puritan in America became a different person from the Puritan in England, and introduced laws, customs and institutions transplanted from his late temporary home. In some of the counties along the Hudson, the descendants of the Hollanders retained their old usages and language within the memory of living men. The records of the old church of Sleepy Hollow at Tarrytown were kept exclusively in Dutch until 1785 when the Rev. Stephen Van Voorhis soon after his coming instituted the use of English in the baptismal service and gave such mortal offense to some of his congregation that his stay was shortened by the opposition so created.

After the English occupation in 1664, when New Netherlands became the royal province of New York, the English common law superseded the Dutch, and except in 1674, when it lay dormant, has remained the basis of our jurisprudence to this day mixed with and modified by a host of old customs and of statutes ancient and modern.

Another change took place at the Revolution. The common law of England as it was before our independence is declared to be the law of the State of New York, certain statutes, however, of Elizabeth as to charitable uses being decided not to be a part of the common law.

But from that time the statutes and the decisions of courts continually widened the differences between the laws and the practice of the various states and they drifted farther from their early state and from each other.

Even in the earliest days, however, the student and the searcher of records will notice a radical difference between the New England and the Middle States. The town system in the former is the basis of much of their government and taxation and of their law and records. The town is their political unit and government by the town meeting is the institution said to have been so much admired by Thomas Jefferson. There is little trace of any such thing in New York. The county is the unit. The town supervisors meet and direct the affairs of the county as a board. The poor are housed not in town farms and houses, but in county houses. The courts sit and all records are kept at the county seats. The probate judges

are county judges or surrogates of counties. The records of births, deaths and marriages, if kept at all, are there or with the boards of health of cities and villages which may or may not coincide with the boundaries of the town.

To the genealogist especially this is a source of vexation for he finds nothing like the Connecticut town clerks' and probate records while trying to trace family lines up or down.

The Revised Statutes of 1827-8 made great changes in the laws of real estate, specially as regards uses and trusts and in wills. Among other things it was no longer necessary to use the word "heirs" in order to create a fee.

Land can only be entailed for two lives in being at the death of the testator or the commencement of the trust and twenty-one years after instead of any number of lives as in England, Connecticut and others of our states. Many succeeding revisions of the statutes have followed. Seals are no longer necessary reversing the old common law which required a seal only and not a signature.

Next came the new Constitution of 1846 and the Judiciary Act of 1847. The judges became elective for varying terms of years instead of being appointed for life or during good behavior. This is supposed by the best thinkers to have been a mistaken policy and to have lowered the standard of the judiciary making them more dependent on political leaders and generally drawn from a lower rank of lawyers than formerly.

The Court of Chancery was abolished and all legal and equitable jurisdiction united in the Supreme Court and all suits which might be pending in Chancery July 1, 1847, were transferred to it.

This was immediately followed by the Code of Procedure with its sweeping changes revolutionizing the old court practice which hitherto had been much the same in all the older states that inherited English forms of actions, among other things the distinction between actions at law and suits in equity was abolished as well as the different forms of those actions. By the time this code had been amended as perfectly as its nature would admit, and thoroughly adjudicated and understood the Code of Civil Procedure was substituted for it in 1877 and with its yearly amendments has made great and sometimes radical changes in practice and pleadings and occasionally in rights as well as in remedies.

The real estate laws of 1896 and their amendments have followed and so far close up this chapter.

All these make up "a mighty maze and all without a plan." The result has been an uncertainty in regard to titles, encumbrances and procedure in real estate actions so great that one distinguished firm

in New York city frequently advised their clients in any large purchase to decline taking title until a suit for specific performance had been carried to the Court of Appeals so that they should have an adjudicated title and a fair certainty that they could thereafter borrow on it or sell.

Some remarks on a few of the more prominent and peculiar actions and proceedings affecting real estate as they have developed under the laws above mentioned may be of interest to students in a state whose history and laws differ so widely from ours, and I have chosen for this purpose

Roads and Highways,  
Condemnation Proceedings,  
Probate Courts,  
Partition and Foreclosure.

The idea of a code is attractive. To codify the result of many years' enactments and decisions into a few brief sentences so that every student can see the whole subject at a glance seemed to be a great step in the direction of certainty, simplicity and economy. Every right, every remedy should be plain and definite. When the Code of Procedure was adopted, its author, David Dudley Field, said with Horace: "*Exegi monumentum aere perennius, regalique situ pyramidum altius.*"

But it proved to be an iridescent dream. The old law and practice had become well settled, but the attempt to embody them in new words made new misunderstandings and new litigation. Then the mania for amendments began.

That great lawyer, James C. Carter, said: "The American people are afflicted with a passion for legislation amounting almost to a disease." For sixty years every session of the legislature has brought forth a crop, often to serve some private end. The largest part of the reports have been devoted to decisions on questions raised by the code. Only one state has been worse code-ridden than ours. An old justice of the Supreme Court of the United States once told the author that when a question came before them involving any section of the California code, it was necessary to read the whole work through to see if some other section did not modify or repeal it.

It is not in the scope of this article to go deeply into the subject but merely to mention a few of the actions and proceedings which seem most to need reform and briefly refer to a few remarkable cases which have arisen under them.

#### FIRST OF HIGHWAYS.

The question of the respective private and public rights in the roads and highways has been strenuously litigated and the decisions

are most conflicting. As cities grew and street railways, steam railways and other corporations were chartered and began to use the streets and roads, the subject became of importance and the courts have held that they came under three entirely different kinds of law. There still exist some of the ancient roads opened under the Dutch government. These came under the civil law and belonged absolutely to the sovereign and his successors. The title to highways opened under the ordinary common law is vested in the owners of land lying on each side subject to the easement of the public to pass over, but not to the use of corporations, like railways, etc., and this extends to some of the older streets of cities. As to the newer streets the fee is generally in the corporation but strictly in trust for the people. Still different principles have been applied in cases of trespass of elevated railways, of highways or private roads closed, and of the conflicting rights of land owners and municipalities. Whoever will take a New York Digest under the title of "Highways" can soon find a mass of contradictory decisions full of such nice differences and hair-splitting distinctions as would delight a school man of the Middle Ages.

In this connection the matter of Apthorp's lane is one of the most curious. It is reported in *Mott v. Mott*, 68 N. Y. Reports 246 and 8th Hun's Reports 474 decided in 1877, and illustrates the uncertain varying decisions of our courts as applied to the meaning of like words under different surrounding conditions, and also the beauties of our statute of limitations under which the quiet possession of a life time may give no good title.

The executors of Dr. Valentine Mott had in 1874 sold a number of lots in the city of New York to Mr. Cossitt who refused to complete his purchase because an old lane twenty feet wide ran diagonally across them. The title had come from the heirs of Charles W. Apthorp who died in 1797 owning a farm through which ran this lane from Central Park westward. The piece north of the lane was sold by his heirs in 1799 and the piece on the south in 1800. The deeds ran to the side of the lane and then along it and with the privilege at all times of using the same, etc.

By the commissioner's map in 1809 the city was laid out into rectangular blocks and the old roads and lanes legally closed. Dr. Mott had bought the land on both sides in 1833 and 1834 and supposing that he owned the lane had closed it up by locked gates. The special and general terms of the Supreme Court both declared his title to be good but the Court of Appeals, while admitting that the terms of the old deed in 1799 would convey the fee of a highway decided that in case of a lane the probable intent had been only to

grant the right of user. That the fee was still in the heirs of Apthorp, but yet that Dr. Mott's estate or assignees had the entire right to use and enjoy the land. Now in ordinary cases adverse possession of twenty years under claim of title would have been sufficient. But infants and married women were excepted under the statute of limitations and it chanced that one of Apthorp's daughters marrying under the age of twenty-one years was still alive, and so for seventy-four years the statute had not begun to bar her rights.

Up to this day more than half of the lots in a fine block are poorly improved and lessened in value because a strip twenty feet wide crosses them which the owners under this ruling have the sole right to use and occupy but do not own.

The actions thought by Mr. Fiero to be most in need of reform were partitions and foreclosures, but I place at the head—

#### CONDEMNATIONS.

First and most profitable to those engaged in them are proceedings to condemn real estate for public uses. They stand pre-empt for the same reason that "Satan, exalted, sat in his infernal assembly."

They are conducted before three commissioners appointed by the Supreme Court to take proof of title and incumbrances, to hear the claims of owners and to report to the court upon the value to be paid for the land. The court then hears and decides on any objections and fixes their compensation and expenses. It is not only that the proceedings are often believed to be corrupt but that both the legislature and the courts have united to make them as extravagantly costly as possible. The commissioners sit as often as they choose. Any member who does not actually attend has his appearance noted and is constructively present, and the length of their day may be anything which can be appreciably measured by the clock. Among the pieces of patronage most valued by some judges are the appointments of their favorites and political friends to be commissioners in condemnation proceedings. Their fees are practically unlimited being in the discretion of the court which generally grants whatever is asked. A good example is the matter of Hamilton Park which the Controller of New York is now trying to investigate. The city has just paid more than \$151,000.00 in condemnation proceedings for a small triangle of land which the owner had long offered for sale at \$80,000. This is not a glaring instance. One part of the law which vests title to land in the city when proceedings are begun I believe to be unconstitutional and a taking of private property for public use without compensation. Agreeing to fix a

price for property to be paid at some far future time if the town or city is then able to do it is not the equivalent of cash.

OF PROBATE AND SURROGATES' COURTS.

There is nothing more peculiar to New York than its probate courts and proceedings.

Under the Dutch government the jurisdiction over estates was governed by the Roman law and the custom of Amsterdam and exercised by the Colonial Council and the Court of Burgomasters. After the English occupations in 1664 it was transferred to the mayor's court and wills and inventories were recorded with the secretary of the province in New York city. After 1689 all probates and inventories were taken by the governor-general or the secretary as his deputy who held what was known as the Prerogative Court. The surrogate at first was only the governor's delegate and the governor's approval of a will recited that "to me and not to any inferior officer whatsoever pertains the granting of probate and administration."

Since the Revolution, wills have been proved and recorded in the counties where the testator resided. The Prerogative Court of the Secretary kept no records so far as could be discovered. It was abolished at the Revolution. In many counties the surrogate's office was vested in the old Common Pleas, now the County Judges; in many others he is a separate officer. Since 1746 his powers have continually increased till now he is an officer altogether unique, being a court of record and uniting all the powers of surrogate's, probate and orphans' courts of other states as well as many of the powers of the higher courts of equity. He admits wills to probate, grants administration, tries the cases of contested wills and has concurrent jurisdiction with the Supreme Court and in some cases exclusive jurisdiction over all matters of the appointment, removal and acts, and accountings of administrators, executors, trustees and guardians.

Up to the year 1880 the proceedings and the law in his court were much like those of the English ecclesiastical courts. His attorneys were called proctors; the process issued is not a summons but a citation and the fees and allowances were until recently unlimited. It was the custom in contests over probate, etc., to grant allowances impartially to the victors and the vanquished. Sometimes they amounted to half the property. It became a by-word that a rich man did not dare to die in New York, for someone would contest his will to get huge allowances. The practice was even more desirable than that of David Copperfield's little clique of proctors.

At last the legislature put an end to the scandal; only the prevailing party receives costs and allowances and they are all strictly limited in amount.

The probate of a will or the grant of administration is not a simple matter. The husband or wife, all heirs and next of kin, all persons in being who would take any interest in the estate by the will, must be cited. If they reside in the state they must be personally served and if non-residents an elaborate and technical mode of advertising must be had and the will cannot be sworn to and prove itself as in Connecticut.

The proof of an uncontested will is almost equivalent to a trial. Inventories and accountings are equally formal and no decree is binding on a person omitted or improperly served. But with all this the surrogate lacks one of the most essential powers. An administrator in Connecticut desiring to sell real estate has a simple mode of petition to the probate judge for an order of sale. But neither the surrogate nor any court in the state of New York can grant such relief. The only power is to order a sale on proof that the personal property is insufficient to pay the debts of the deceased and this proceeding is so technical, the uncertainty of titles under it so great that practically it merely prevents any sale by the heirs during three years.

A curious situation arises where an executor not specially authorized under the will buys real property with funds of the estate. Some contend that he can never sell it again; others that he has by his wrongful act taken it, not as an executor, but individually, or else that by the principle of equitable conversion the land remains money, and in either case he can give a good title, as, where he takes property in foreclosure brought by himself.

It has not yet been decided by the Court of Appeals and remains as doubtful a question as that which puzzled the lone jurymen told of by Mr. Albert Matthews, who being accepted on a trial for lack of any more jurymen, heard the evidence, the learned speeches of counsel, and the judge's charge, and after a long deliberation reported to the court "that the jury could not agree."

It follows that the action of partition is more necessary and more frequently resorted to in New York than elsewhere as it is so often the only way in which land belonging to tenants in common under wills, trust deeds, or as heirs of intestates can be sold. Even a special act of the legislature will not avail as was decided by the Court of Appeals in 1873 in the case of *Brevoort v. Grace*, 53 N. Y. Reports, page 245.



Leffert Lefferts owned eighty-five acres in Brooklyn and died in 1847, leaving a will by which he devised one-half the income of his farm to his wife during her widowhood and the residue to his daughter, Mrs. Brevoort, for life,—the remainder of the farm to her issue in fee. In case she left no issue her surviving, then such remainder to such children of his brother John as might be living at the time of testator's death. The farm was in the city of Brooklyn, the taxes and assessments were far above the income; parts of it were sold for taxes and the devisees were fast being ruined. In 1872 the legislature by special law authorized a sale by order of the Supreme Court on petition of Mrs. Brevoort, her husband and issue and on appointment of guardians for all minor heirs and the investment of the proceeds for those who might be entitled to the income or the land. She was then fifty-one years old, her only son over twenty-one and the descendants of John were about thirty in number.

The petition was made and an order of the Supreme Court with all the requirements of the law, and a sale took place. The purchaser refused to accept the deed, the Supreme Court decided the title to be good, but the Court of Appeals held that the legislature had no power to cut off the contingent remainders of the adults and rejected the title.

Mrs. Brevoort then began action for partition and made as parties every person who by any contingency present or future might have or claim any interest or lien in the land. This, too, was litigated to the Court of Appeals which finally in 1877 confirmed the sale, but only on condition that the proceeds were invested in trust to answer to any future rights of persons living or yet unborn. See *Brevoort v. Brevoort*, 70 N. Y. 36.

#### PARTITION.

The action of partition is the most difficult, complicated and expensive of all real estate actions. It is substantially the old Chancery suit modified by the Revised Statutes and the Code. It may be brought by any tenant in common and may ask for actual partition or sale and may incidentally contest the validity of any will involving the title. The parties as directed by Section 1538 of the Code must be "Every person who by any contingency contained in a devise or grant or otherwise is or may become entitled to a beneficial interest in an undivided share therein." If infants are concerned it must include all lands owned by the parties in common and if a sale is wanted it must also appear that actual division cannot be made without great injury to all interests and every person having any lien general or specific must be made defendant.

Very elaborate provisions are made for absent or unknown or infant defendants which, being statutory, must be exactly followed and cannot be amended by the court. When the case is ready for trial a referee is appointed to take proof of the facts and of the title. His fees and expenses are unlimited. On his report a decree of sale is made and another referee appointed to make sale, after which another decree follows confirming the sale and distributing the proceeds. The question of who are the necessary defendants has caused more litigation over this action than all others. In the good old days some thirty years ago the judges assumed the rights of the English Court of Chancery over a fund in court and granted allowances at discretion to the attorneys. I remember one case where property belonging to some infant children was sold for about \$6,000—and the costs and allowances were over \$4,000. But the Court of Appeals finally decided that no such authority had ever existed in our courts. The total allowances to attorneys cannot now exceed \$4,000. The other expenses of course are unlimited.

Looked at from the proper point of view the action of Partition, like the famous suit of *Jarndyce and Jarndyce*, is a consistent and beautiful whole—a monument of legal lore, exhibiting sometimes every expedient and every cheerful fiction of practice.

But as a practical means for selling and dividing estates it is an unscientific, clumsy and profligate mode of devouring widows' and orphans' houses.

#### FORECLOSURE.

A mortgage is an anomalous instrument. It is a conveyance and any deed with a defeasance, even a verbal one, is a mortgage, but a mortgage is not a conditional deed. It is merely a collateral security, and a decree foreclosing it is only an additional security for the debt and expires under the statute of limitations. So far have we departed from the oppressive old common law which gives interest to Scott's "Fortunes of Nigel."

In many of the states it is a deed of trust and foreclosure on default is a simple matter of advertisement and public sale by the trustee leaving any other lienors or creditors to assert their claims on the surplus moneys. In New York the statutory foreclosure under the power in the instrument is full of technicalities and seldom used, so the ordinary resort is to the action in equity. Under this the sheriff or a referee is finally appointed to sell the land at auction and for any deficiency the plaintiff has personal judgment against the mortgagor. The decree "is a bar against each party to the action who was duly summoned, and every person claiming

under a party by title accruing after filing of notice of pendency of action" (Code of Civil Procedure, Section 1632).

It follows that if any person having any estate or claim, legal or equitable, is omitted from any of the proceedings he is not affected, and may redeem till barred by limitation of time. How long this may be was shown in the case of *Giles v. Solomon*, 10 Abbott Practice Reports, new series, page 197. The plaintiff's father died in 1840, leaving a widow and six children. In January, 1841, a foreclosure was brought against their property, making them all parties. Two days before final decree the plaintiff, a posthumous child, was born and not made defendant. It was held that he could redeem the property in 1866, twenty-five years after the sale. Besides an unscrupulous defendant can delay the action for years by some trivial defense and a series of motions and appeals so that a foreclosure may at times become a formidable operation.

There are several radical defects common to all real estate actions alike. The judgment or decree is conclusive only on defendants who were properly summoned and persons claiming under them. Now whoever searches a title in New York will find twenty or more liens and incumbrances filed or recorded in many different public offices. Half of these, such as judgments and various kinds of bonds, etc., are general liens, entered only against name and affecting all the property of the individual whose identity sometimes remains an unknown quantity.

Besides the courts have held that the index is no part of the record which is equally effectual, although omitted from the index.

There are also facts of family history not of record: *e. g.*, marriage, descent, infancy, etc., which often baffle all inquiry. The wife's dower in New York attaches to all real estate of which the husband is seized at any time after marriage and the laws on the subject of marriage are loose, answering closely to Wilkie Collins's rather sarcastic description of the law of Scotland. It is a civil contract with no need of form, ceremony or witnesses. Any woman is presumed to be the wife of any man against whose estate she makes claim. She may assert, as one woman did, that the agreement was made on a ship in the English Channel, or in any other place where it is not actually void by local law, and they who oppose her must prove a negative.

And when all possible parties have been brought in there remain the requirements of the statute in regard to infants, unknown or absentee defendants, which must be strictly followed or the court has no jurisdiction. As no proceeding short of the final decree actually entered, is binding on any person upon whom a right or title

devolves by operation of law, it will be seen that during a long action there is an excellent opportunity for new defendants to come into being by birth, marriage, death or bankruptcy.

The law on this point was finally settled by one of the most remarkable and bitterly fought ejectment suits. Isaac Requa died leaving a farm at Tarrytown on the Hudson, and in 1826 a suit for partition was begun by his heirs in the Court of Chancery. Just before final judgment, when all proceedings against all defendants had been taken "*pro confesso*," one of them, a brother of deceased, died leaving infant children. They were not made parties, but the order of sale was made and the sale made and confirmed Nov. 6, 1826. In October, 1827, the court ordered the action to stand revived against the infants and the proceedings confirmed, and on consent of their solicitor, part of the proceeds were invested as a dower fund for their mother and the rest was paid over to and for them.

In 1844 several of them brought ejectment against the purchasers claiming that the judgment was not binding upon them because they had not been brought in as original parties and allowed to defend from the beginning. They were defeated but in 1857 the Court of Appeals ordered a new trial. In March, 1860, they were again defeated. Again in 1861 the Court of Appeals ordered a third trial which was had in March, 1862, and in 1863 the Court of Appeals gave final judgment in their favor and the point was settled that a person on whom a right or title devolves by operation of law must be made a party and the action proceed against him "*de novo* and *ab origine*." The suit which the plaintiffs once offered to settle for \$500 and were refused, finally ruined two successive owners of the land and cost another \$20,000, and ran its course for twenty years. See *Requa v. Holmes*, 16 N. Y. 193, decided, 1857; *Requa v. Holmes*, 26 N. Y., decided 1863.

Another great defect is the lack of any record whose recital should be conclusive evidence of the various proceedings in the action. The so-called judgment roll is merely a bundle of detached papers tied up with tape. The whole jurisdiction of the court depends on a mass of separate appearances, orders and affidavits of service, mailing and publication. By time, carelessness or design, some of these may be lost and with them goes all proof of jurisdiction.

There are always persons hunting up flaws or omissions and many are the titles clouded thereby. It is no wonder that the cost and uncertainty of real estate searching have caused the rise of title

companies which have almost supplanted the individual conveyancers.

Two simple changes in the law would at once do away with much of the searcher's labor and the present cost and delay of actions. The first is to abolish all general liens. Let judgments affect no land until it is taken in execution. The second is let there be dower only in land which has not been sold during the husband's life, and require the claim to be promptly made. But the only complete reform is the Torrens system of governmental registration of titles now in force in Australia, so that the evidences of ownership may pass from hand to hand as simply and safely as do those of personal property.

*Pierre W. Wilkey.*

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## PUBLIC TRIAL. EXCLUSION OF SPECTATORS.

Does the judge of a trial court, presiding in a criminal action, have the power to exclude from the court-room all persons who have no connection with the case at bar?

Defendant is indicted on a charge of rape, and at a stage where the testimony is known to be of a decidedly loathsome and salacious character, the judge presiding announces that the proceedings will be continued in the small probate court-room, and directs the sheriff to admit none therein except the jury, counsel, members of the bar, newspaper men and one witness. The defendant's counsel offers no objections, at the time, to the pursuance of such a course.

Such are substantially the facts upon which the appeal was based in the case of *State v. Hensley*, 79 N. E. 462, recently decided in the Supreme Court of Ohio, and it is held, in a very lucid opinion by Spear, J., that such an order infringed the right of the accused to "a speedy and public trial" as guaranteed to him by the Constitution, and that failure to protest at the time against the violation of the right did not constitute a waiver of it. Like the right in case of a felony to be tried by a jury, it cannot be waived or dispensed with by mere silence.

This case presents questions of an exceedingly interesting nature, and the reasons underlying its decision could profitably be studied from the historical as well as from the legal standpoint. It has seldom been passed upon by our courts and the text-books are nearly, if not quite, barren of authority on the subject. There is neither time nor space here to treat extensively the rise and development of the right, but endeavor will be made to succinctly state a few of the salient points relative thereto.

It appears that under the Roman system of jurisprudence, publicity at a trial was not a prerequisite to the validity of the proceedings, and the taking of testimony in private was the rule rather than the exception; and in the Ecclesiastical courts of England, and wherever the procedure is found to be modelled after that of the civil law, the situation seems to be the same. Under the common law, however, the proposition seems to be well authenticated that there existed such a right; a right recognized, perhaps, more in theory than in practice, but nevertheless affirmed in several decisions. Accordingly we find an early mention in *Lilburne's Trial* (1649) 4 How St. Tr. 1269, 1273, where a distinct claim is made by the accused to it; and again, Justice Blackstone, in commenting on the relative advantages and disadvantages of the various systems of administering justice, states: "This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination taken down in writing before an officer or his clerk in the Ecclesiastical courts and all others that have borrowed their practice from the civil law, where a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal." 3 *Blackstones Comm.* 373. The cases of *Collier v. Hicks*, 2 B. & Ad. 663, 668 and *Danbury v. Cooper*, 10 B. & C. 237, 240, also substantiate the statement above made. In 1848, the English Parliament passed an act which invested trial justices with a discretionary power as to excluding spectators during the conduct of cases, if reasons of expediency, morality or public policy demand it. St. 11 and 12 Vict. C. 42, Section 19.

In this country, our progenitors, in order to secure inalienably the right, embodied it in our Federal Constitution, (VI Amendment), and most of the various states of the Union have incorporated in their Constitutions the same provision in substance, and in the great majority of instances have adopted identical phraseology.

It has been held that the first ten amendments to the Federal Constitution are primarily restrictions on the power of the Federal government only and not applicable in their provisions to the various states. Hence it follows that the right to a "speedy and public trial" therein guaranteed is restricted to prosecutions in the U. S. Courts. *Spier v. Illinois*, 123 U. S. 131, 166. If the marshal of a district court, by order of the presiding judge, stands at the door and in the exercise of his discretion as to proper persons to admit, prevents the entrance of practically all negroes who present themselves, it is reversible error. *U. S. v. Buck*, 24 Fed. Cas. No. 14680. No further interpretation than this has been placed upon what constitutes a "public trial" within the meaning of the constitutional provision, by the Federal judiciary.

In the state courts the decisions as to the interpretation of similar clauses in their respective constitutions, have been by no means harmonious. To start with, there are three classes of cases: First, those in which the court excluded all persons except jury, officers, defendant and counsel without any reservations or qualifications: Second, those in which all persons were excluded, with aforesaid

exceptions, but permission was given to accused to name any special friends he desired to have present, who, it was stated, would be allowed to remain: Third, those in which the court excluded a certain portion of the audience such as children, "court loafers," etc.

Regarding the first class, such action, in view of the decisions, would probably not be sustained by any court of review. In a Texas case there were facts existing which at first blush would seem to bring it under this category, but there the spectators were so boisterous as to completely obstruct the course of the trial, and the ones causing the disturbance could not be separated or distinguished from the others. All were excluded temporarily. *Held*, no error. *Grimmett v. State*, 22 Tex. App. 36.

As to the second class, the decisions of two states at least are irreconcilably at variance; the Supreme Court of New York holding such a course of proceeding not to be error, and the Supreme Court of Michigan, that it is. In *People v. Murray*, 89 Mich. 276, 290, the court ordered an officer to stand at the door and admit none but respectable citizens. A judgment of conviction rendered by the lower court was reversed on this ground, and the statement was made that it is not incumbent on the accused to show that he was injured or prejudiced by such action. A constitutional right of his has been invaded and that is sufficient; the law will conclusively presume that injury resulted. It is not to be considered, the court proceeds to state, as a wrong solely to the individual, the accused, but the whole body politic is aggrieved thereby. In a later case, where the court made an order that none should be admitted but jury, court officers, counsel and whatever friends defendant desired, it was held error, and a statute conferring such power on the court, declared invalid. *People v. Yeager*, 113 Mich. 228. On practically the same state of facts (but members of the press were here allowed to remain) the New York court arrived at a contrary conclusion. *People v. Hall*, 51 App. Div. 57. This latter view is also maintained by the California Court. *People v. Kerrigan*, 73 Cal. 22.

Respecting the third class, the principal case, *State v. Hensley*, *supra*, contains a dictum to the effect that such a course would be fully justified and constitute no impairment of a constitutional right, and the position is also supported by *dicta* in other cases and by at least two eminent authorities, Judge Cooley and Professor Wigmore, who both concur in the opinion that prudential reasons often demand that youths of both sexes, "court room loafers" and those attracted merely by a prurient curiosity should be rigorously excluded from the court-room in occasional cases. Ethical reasons dictate such a course; public morality demands it. "A public trial is not of necessity one to which the whole public is admitted, but it is one so far open to all that the prisoner's friends and others who may be inclined to watch the proceedings, in order to see that justice is intelligently and impartially administered, may have an opportunity to do so. There may be and often is justifiable occasion to exclude from a trial those who are inclined to attend from idle or morbid curiosity only, and especially in cases involving loathsome or dis-



gusting details." Cooley, *Principles of Constitutional Law*, 320. See *Wigmore on Evidence*, Section 1834.

This constitutional provision so often found in no wise is applicable in civil suits, and for this reason the New York Code of Civil Procedure enacts that in all cases of divorce for certain enumerated grounds, "the court may in its discretion exclude all persons not directly interested except jurors, witnesses, and officers of the court," and this appears to be a most salutary provision.

Abbott's Trial Brief for Criminal Cases, (N. Y.) lays down the following: "The exclusion . . . of all persons other than those interested in the case, where, from the character of the charge and nature of the evidence, public morality would be injuriously affected, does not violate the right to a public trial;" but as we have seen, it is extremely doubtful whether this proposition can be maintained on grounds of logic or authority. It is stated too broadly. The better opinion seems to be the one shared in by Judge Cooley and Professor Wigmore to the effect that the sound discretion of the court should control as to what spectators should be present, but that the power should not and does not extend to a wholesale exclusion of persons not directly interested. The presence of persons of mature years and whose moral standards are not notably deficient, exercises a wholesome effect upon the conduct of a trial, and to dispense with general publicity in trials involving criminal offenses would neither be expedient nor consonant with those principles of liberty which permeate the whole fabric of our jurisprudence.

#### AMOUNT OF RECOVERY FOR UNLAWFUL DISCHARGE.

In a recent Louisiana case, *Thurmond v. Skannal*, reported in 42 So. 577, the plaintiff sued to recover the full amount of his stipulated salary from the time of his unlawful discharge to the natural end of his term of service. The action was brought before the term was up, but the court held that he was entitled to the agreed salary in full for the unexpired portion of his contract.

The question involved is not a new one and many decisions are to be found as to the amount of recovery which seems to vary with the nature of the action brought. An employee wrongfully discharged is given a choice of three remedies; (1) He may treat the contract as rescinded and sue on a *quantum meruit* for the value of the services rendered, or (2) he may sue for breach of contract and recover his probable damages, or (3) he may wait until the end of the term and sue for actual damages sustained. *Colburn v. Woodworth*, 31 Barb. 381.

A leading case on this subject is that of *Howard v. Daly*, 61 N. Y. 362. Here a valid contract of employment was entered into, and plaintiff was not allowed to begin his actual service; but this fact does not affect the ruling in the principal case where the service had already been entered upon. The court, in an opinion by Dwight, C., says that it is important to decide whether the plaintiff sues for wages on the basis of a constructive service, or for mere damages. An actual performance will undoubtedly entitle the plaintiff to her stipulated salary, but here there has been no per-

formance of the contract. Disapproving the doctrine of a constructive service, (*Gandell v. Pontigny*, 4 Campb. 375), the court says that a suit for wages as such is not maintainable, and damages for breach of contract only may be recovered. 7 Ad. & Ell. 544. *Prima facie*, the amount of this recovery is the agreed salary. But the plaintiff must make some reasonable effort to mitigate the damages which the defendant must pay by using reasonable diligence in seeking some other similar employment. This rule is based upon public policy, and tends to prevent a discharged employee from living in idleness while drawing a salary.

Conceding the general rule to be true, that the party aggrieved by a breach of any contract should make every effort to mitigate his damages, it would seem to be only fair that a discharged employee should seek other similar work. And so it has been held by the authorities that the defendant may show that the plaintiff has obtained other employment or might have, with reasonable effort, secured similar employment. *Troy Fertilizer Co. v. Logan*, 96 Ala. 619; *Houson v. Mestayer*, 14 Daly 83. It is true that some cases lay down the rule of liability approved of in the principal case, but on principle and sound policy, this rule should be taken, at the most, as a *prima facie* measure of recovery. *Heim v. Wolf*, 1 E. O. S. (N. Y.) 70; *King v. Staren*, 44 Pa. 99; *Jones v. Jones*, 2 Swan (Tenn.) 605. In all fairness, however, the defendant should be required to assume the burden of proof in an attempt of this nature to decrease his liability. *Van Winkle v. Satterfield*, 58 Ark. 617; *Horn v. Western Land Association*, 22 Minn. 233; *Emery v. Steckel*, 126 Pa. 171; *Barker v. Knickerbocker Ins. Co.*, 24 Wis. 630; *Owen v. Union Match Co.*, 48 Mich. 348; *Williams v. Anderson*, 9 Minn. 50; *Cumberland & P. R. Co. v. Slack*, 45 Md. 161.

In considering the law on this subject in Louisiana, Art. 2720 of the code of that state must be taken into account. This section provides that the discharge of an employee under these circumstances vests in him at once all his unearned salary; and the fact that he has secured other employment makes no difference. *Sherrburn v. Orleans Cotton Press*, 15 La. 360. Thus by means of this statute and decision, the very evil and injustice, which other courts have prevented by allowing mitigating defenses, is fostered and encouraged. In such cases the law only aims at compensation, and such defenses tend to obtain it and no more. Any person guilty of a breach of a contract should only be required to pay actual damages. The rule in Louisiana places an employee discharged without cause in the enviable position of drawing a salary while idle or engaging in other employment and perhaps earning double what he is worth, in an economic sense, to the community. Plainly such a rule is contrary to both policy and authority.

#### STATUTE OF FRAUDS. PAROL MODIFICATION OF CONTRACT.

The Supreme Court of Illinois in a recent decision (*Kissack et al. v. Burke*, 79 N. E. 619) decides the point, *inter alia*, that when one party makes an offer to another in writing, to sell land, with a proviso that it be accepted within a certain time, a parol agreement

to extend such period of acceptance is not void, and in the event that the other party is ready, able and willing to perform his portion of the contract before the expiration of the time verbally stipulated, he may maintain a bill in equity for a conveyance of the land. It was strongly urged by appellees that the extension not being in writing, was entirely inoperative, as offending the Statute of Frauds, and that the rights of the appellant were concluded by his not having accepted the contract in its original form, but they were not sustained in their contention.

Authority may be found on either side of this proposition. At common law, of course, the terms of a written contract cannot be varied, added to or subtracted from by parol evidence. But in case the parties agree to alter it in some essential particular by a *subsequent* agreement, the old contract is discharged, a new one formed, and an action may be maintained upon this new *verbal* contract. But a different question is presented when the original was such as was required to be in writing. Then the substituted agreement is invalid, and the query is whether the original, with a parol modification engrafted upon it, is capable of enforcement.

At first the courts began to differentiate the cases on the ground of whether the particular in regard to which the contract was changed was a material one or not, *Stead v. Dawber*, 10 Adol. & Ell. 57, but this finds no countenance in the later cases. Then there are a number of decisions in which it is held that such a contract is invalid. *Goss v. Lord Nugent*, 2 Nev. & Man. 33, 34; *Harvey v. Grabham*, 5 Adol. & Ell. 61, 73; *Hasbrouck v. Tappen*, 15 John. 200; *Doar v. Gibbs*, 1 Bailey Eq. (S. C.) 371. The following statement is made in *American & Eng. Cyc. of Law* (2 Ed. Vol. 29, 825): "If any alteration is made, so that part of the contract has to be proved by oral evidence, it ceases to be a contract in writing, and is thus exposed to all the evils which the statute was intended to remedy. Within the rule, the time of performance cannot be extended or changed by parol, nor the time within which the contract is to be completed by an acceptance by one of the parties." Thus where a party orally agreed to "carry" goods for a longer time than the contract specified, only the terms of the original contract could be considered as binding upon the parties. *Clark v. Fey*, 121 N. Y. 470. A case arose in Wisconsin on a state of facts analogous to those in the main case (cited *supra*) and it was adjudged that the verbal extension of the time for acceptance could not be considered effective, and it is there stated: "Where the law requires a contract to be in writing in order to bind the parties, and the writing signed and produced in evidence shows that the contract signed by the party who is to be bound by it is to be completed by an acceptance of the other party within a limited time, it is incompetent to show by parol evidence that the time for its completion, by such acceptance, was extended to some other date not mentioned in the contract signed by the party to be bound. The acceptance of the party after the time fixed in the written contract, which is to bind the party signing it, does not show that the contract in writing was the contract between the parties, but an entirely

different contract, and so the contract actually made by an acceptance, after the time fixed in the writing, is a contract not in writing, and so void under the statute." *Atlee v. Bartholomew*, 69 Wis. 43, 50. Numerous cases can be cited which take the opposite ground. See cases cited in 20 *Cyc.*, page 288, note 74; and 23 *Cent. Dig.*, tit. "Frauds, Statute of," Section 284.

In this apparently irreconcilable conflict of decisions, there is one rule to be deduced which will materially aid in harmonizing many of them, and that is:—When the written agreement as altered by the parol modification is declared upon, the action will not be sustained as this would be going in the teeth of the statute, but where the original agreement, and that alone, is the foundation of the action, then the substituted or altered term may be relied upon by way of accord and satisfaction, as performance or readiness to perform under the terms of the parol variation is equivalent to performance or readiness to perform under the contract as written; and it is held that proof of such will not constitute a variance from the declaration. *Stearn v. Hall*, 9 Cush. 31; *Whittier v. Dana*, 10 Allen 326; *Browne on Statute of Frauds* (2 Ed.) Section 423, 425, and cases there cited. *Cummings v. Arnold*, 3 Met. 486, holds that in defense to an action on a written contract, the defendant may show that he has performed it according to an oral agreement for a substituted performance, or, being ready to do so, was prevented by an act of the plaintiff. So by this method effect is given to an oral change in the manner or time of performance without contravening the terms of the Statute of Frauds.

The question is often involved in contracts for the sale of goods which come within the purview of the statute and a verbal alteration is made as to the time of performance, etc. In such cases, the courts show much reluctance, and justly so, in allowing the statute to be interposed as a defense and thereby constituting themselves innocent means in the perpetration of a fraud. Endeavor is constantly shown to obviate the rigidity of this rule of law and not to extend its scope but rather to mollify its effect. Reasons of expediency and justice, in its widest and primary sense, demand such a course; otherwise that which was intended for the prevention of wrong might become an engine for its accomplishment.

In many cases the equitable doctrine of estoppel may be invoked. Thus it is stated by the Illinois court in the case under consideration: "In equity, a party is not permitted to deceive and defraud another by agreeing to such an extension, and then disregard it, and thus gain an unjust and inequitable advantage," citing *Thayer v. Meeker*, 86 Ill. 470, 473.

The principal decision is not only in accord with a large line of cases, but is also commendable on other grounds.

#### EXTRADITION. HABEAS CORPUS.

The scope and limitations of the federal laws relating to interstate extradition are quite clearly expounded in *Pettibone v. Nichols*, 203 U. S. 192, decided Dec. 3, 1906. Pettibone was arrested in Colorado in accord with a requisition from the governor of Idaho,

taken to Idaho by its authorized agent and there held in custody in the state prison on a charge of murder committed in Idaho. Pettibone made application for a writ of *habeas corpus*. In this appeal the facts sufficiently alleged in the application were treated as true in their legal bearing on whether the detention was in violation of the Constitution or laws of the United States. In this application Pettibone alleged that he had not been in the state of Idaho for more than ten years prior to the act complained of, and that the governor of Idaho knew that he had not been in the state at the time of the commission of the crime nor at any time near that day. He further alleged that there was a conspiracy between the governor of Idaho and his legal advisors and the governor of Colorado to prevent the accused from asserting his constitutional right under the Constitution (Cl. 2, Sec. 2, Art. 4) and the act pursuant thereof. (Sec. 5278 Rev. Stat.) The execution of the conspiracy was set out and was in substance, that by arrangement he was secretly arrested late Saturday night, and that early Sunday morning he was hurried out of the state of Colorado, on a special train making fast time, by the officers of the state and "certain armed guards being part of the militia of the state of Colorado." He was given no chance to communicate with friends or counsel although he requested opportunity to so communicate. In Idaho he was held charged with the murder of one Steunenberg by throwing an explosive bomb at and against his person. At the earliest opportunity application was made for the writ of *habeas corpus*. The Supreme Court of Idaho, the United States Circuit Court for the District of Idaho, and the United States Supreme Court, McKenna J., dissenting, refused to discharge the accused. Mr. Justice Harlan delivered the opinion of the U. S. Supreme Court. In considering the arrest in Colorado he says, "we do not perceive that anything done there, however hastily and inconsiderately done, can be adjudged to be in violation of the Constitution or laws of the United States." As this man was held for trial under an indictment in one of the courts of Idaho for the crime of murder, charged to have been committed in that state against its laws, his custody was by due process of law. The courts uniformly held that, "his imprisonment was not illegal unless his extradition makes it so, and as an illegal extradition is no greater violation of his rights of person than his forcible abduction, if forcible abduction from another state and conveyance within the jurisdiction of the court holding him is no objection to his detention and trial for the offense charged, as held in *Ker v. Illinois*, 119 U. S. 437, and in *Mahon v. Justice*, 127 U. S. 712, no more is the objection allowed if the abduction has been accomplished under the forms of law." *In re Moore*, 75 Fed. Rep. 821.

The discretionary power of a governor in preparing requisition papers and in granting warrants for arrest upon such papers is generally recognized. The governor's action establishes a *prima facie* case or presumption that all essential prerequisites have been observed. If uncontroverted in such a proceeding as *habeas corpus* such a presumption becomes conclusive evidence of the right to extradite the person charged. *People ex rel. Hamilton v. Police*

*Com. of City of New York*, 91 N. Y. Sup. 760; *Cook v. Hart*, 146 U. S. 183; *ex parte Reggel*, 114 U. S. 642. By the method of arrest and deportation from Colorado the accused was deprived of all opportunity to invoke judicial aid. Had he succeeded in obtaining a writ of *habeas corpus* in Colorado there is no doubt but that he could have successfully interposed that he was not a fugitive from justice under the terms of the federal statute and Constitution. *Ex parte Smith*, 3 McLean 132. Mr. Justice McKenna in his dissenting opinion says, "The foundation of extradition between states is that the accused should be a fugitive from justice from the demanding state, and he may challenge the fact by *habeas corpus* immediately upon his arrest. If he refute the fact he cannot be removed. *Hyatt v. Cockran*, 198 U. S. 691. And the right to resist removal is not a right of asylum. To call it so in the state where the accused is, is misleading. It is the right to be free from molestation. It is the right of personal liberty in its most complete sense." As Mr. Justice Harlan suggests, Congress might provide for the compulsory return to the state of parties wrongfully abducted from its territory on application of the parties or of the state. But Congress has not seen fit to add to nor change the existing law.

The zeal which prompts the bringing of criminals to justice is commendable. But in the exercise of such zeal the safety of the public demands that no means shall be used which are against the intent of federal law. In the present case a man's right to personal security as guaranteed by the federal law is infringed by a legal abduction. This seems an anomaly. It would technically be a legal crime if there could be such a thing. The inadequacy of the law to prevent such abduction is a menace to the personal security and liberty of all citizens of the United States. In our treaty with Great Britain provision is made assuring every person for whom requisition is made, a hearing before the court issuing the warrant of arrest. Thus opportunity to claim any just defense is given. *Ashburton Treaty* (1842). Considering the great extent of our country such a safeguard would be equally warranted, and would be but a reasonable protection to citizens of any state against being surprised and subjected to deportation, possibly from coast to coast or even to the Philippines.

ON THE RIGHT OF A "WALKING DELEGATE" OR "BUSINESS AGENT" TO  
ORDER MEN OUT ON STRIKE.

For many years the courts have been endeavoring to find some solid ground on which to decide the respective rights of employer and employee during labor troubles. Adding to this the problem of the rights of interested third parties, sympathizers, would-be patrons and last of all the duties of the belligerents to the general public a situation then arises which requires the utmost care and study in attempting to conserve the rights of all and wrong none.

In the case of *Booth v. Burgess*, 65 Atl. 226, Vice-Chancellor Stevenson of the New Jersey Court of Chancery has contributed a remarkably well-written and clear opinion. In this case a boycott

was ordered, not by anyone directly interested, but on direction of a business agent or walking delegate who was the representative of a federation of building trades numbering about 2,500 men. The number of men who were actually engaged in dispute with their employer was about twenty-five. It was not questioned that the union to which these men belonged, or its members acting individually refused to deal with the complainant. The right of any member to so bind himself that he might, against his own desire, be ordered or "instructed" to leave his employment for the advancement of the aims of independent associations was denied. The decision goes on the right of everyone to a "free market" recognizing, at the same time, the idea of legitimate competition even when carried to great lengths as in the *Mogul v. McGregor* case. (23 Q. B. Div. 598.) The terms "malicious" and "unlawful" which have proved such a stumbling block in former cases have been treated with scant notice in the principal case. In this connection it is important and interesting to notice the successive stages by which the general question of strike and boycott has developed.

In *Allen v. Flood*, App. Cas. 1 (1898), the jury found that 1. Allen "maliciously" induced the Glengall company to discharge Flood and 2. Allen "maliciously" induced the Glengall company not to engage Flood and 3. that damage was done to the extent of twenty pounds. When the House of Lords, on appeal, decided, after much discussion, that Allen was not liable it seems that the most important fact in the case, i. e., whether the men "would knock off" or "be called out" was still undecided. Naturally, if Allen's statement was that the men would (of their own volition) "knock off" he would not be liable, while if it was that they would be "called out" (leaving the question of volition open to inquiry) the case would not be so plain. In *Quinn v. Leathem* (1901) A. C. 506 (atp. 542) Lord Lindley denied emphatically the right of a union to make use of the boycott and in this connection should be considered the dissenting opinion of so great an authority as Mr. Justice Holmes in the case of *Plant v. Woods*, 176 Mass. 504: "I think it is lawful for a body of workmen to try by combination to get more than they are now getting, although they do it at the expense of their fellows and to said end to strengthen their union by the boycott and the strike." It will be recalled that the majority in this case held the strike unlawful on the ground that it was unlawful to use this means of compelling a rival union to amalgamate with them coupled with the fear that violence, etc., would ensue. The *Plant* case can hardly be considered a strong decision. In *Jersey City v. Cassidy*, 63 N. J. Eq. 764, (also decided by V. C. Stevenson) the court was perplexed to know how an injunction would issue to protect men who were interfered with in quest of employment and sought no redress themselves—the would-be employer being the complainant. The same argument was advanced by the defendants as that advanced by the defendants in *Quinn v. Leathem*,—*supra*, that the complainant could have no redress or protection for injury to the asserted right to deal at will as opposed to damage caused by the breaking of an actual contract. This was met by the "right to

a free market" idea in line with Lord Ellenborough's suggestion of a right to a "possible expectancy." The New York state courts have attempted to decide whether a union may make an agreement with an employer that, on consideration that he will employ only members of a certain union and expel all other tradesmen of the same kind who are not members, it will, in return, keep him supplied with men and ward off strikes for a certain period, a sort of offensive and defensive alliance. In *Curran v. Galen*, 152 N. Y. 37, where non-members of the union were discharged by force of the agreement, Judge Gray says "the effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges." In a later case, *Jacobs v. Cohen*, 183 N. Y. 211, an agreement substantially the same existed but the action was to recover on a note given by the employer as security for his performance of the agreement. Judge Gray there said: "This case is not within *Curran v. Galen*. If it might operate to prevent some persons from being employed by the firm or, perhaps, from remaining in the firm's employment, that is but an incidental feature" and (p. 215) "if they (the employers) regarded it (the agreement to give the note) for their benefit to do so does it lie in their mouths, now, to urge the illegality?" After studying the two cases it is rather difficult to understand why the agreement should be agreeable to public policy when the subject of controversy was between the parties and without the pale when attacked by the injured party directly.

The case of *Temperton v. Russell* (1893) 1 Q. B. 715, was almost analogous to the present case under discussion. There an agent representing a joint committee of a federation of unions coerced an employer by threats of strike to break a contract with complainant who was on the "unfair" list. Lord Esher (p. 725) said "as between themselves the members of the union had a perfect right to do that (threaten to and actually strike, etc.) and to bind themselves to comply with such rules. But these rules cannot bind any person who did not belong to such union" and "there is no distinction between inducing a person to *break* a contract and (inducing him) *not to enter* into a contract." This is the same idea referred to previously as a "probable expectancy."

In *Nat. Prot. Assn. v. Cumming*, 170 N. Y. 331, Parker, C. J., said, "A labor organization is endowed with precisely the same legal right as an individual to *threaten* to do that which it may lawfully do." This case is a clear and avowed affirmation of the right to strike.

A summary of the cases indicates that under the law as now understood, *one* or *one thousand* may unite, whether such union be called "conspiracy" or other technical name, and not only refuse to enter into or continue in the employ of a master but may name the terms on which the relation shall commence or continue. That these terms seem founded on good or bad motives or that they may interfere with the employment of others at that place and under that master is immaterial. It seems to be denied that a number of such unions may, through federation with other trade councils, force the



members who have no direct concern in a quarrel to obey the order of a delegated official to leave or refuse to enter the employment of a black-listed employer—even though these employees may have agreed to this very thing on becoming members of their individual unions. It is of course a well-known fact that such agreements exist among the employers and are generally cheerfully carried out.

The principal case, in line with *Temperton v. Russell* (1893), Q. B. 713, holds that, even if an individual member be willing, that it is against public policy and violating the right of "free market" to allow him to so bind himself.

## RECENT CASES.

**ASSIGNMENTS—SALE OF EXPECTANCY—VALIDITY.**—HUDSON v. HUDSON, 78 N. E. 917 (ILL.)—*Held*, that an estate in expectancy may be the subject of a contract of sale which will be sustained when the transaction was fair and supported by a valuable and adequate consideration.

While a mere expectancy could not be released or assigned at common law. *Hart v. Gregg*, 32 Ohio St., 502, nevertheless such an assignment is upheld by equity. *Parsons v. Ely*, 45 Ill. 232, provides it is without fraud and is supported by a valuable consideration. *In re Garcelon*, 104 Cal. 570. *Kenney v. Tucker*, 8 Mass. 143. Love and affection does not support the transaction in the case of an insolvent debtor. *Read v. Mosby*, 87 Tenn. 759, and a mere possibility or expectancy, not coupled with any interest in or growing out of property, can not be the subject of a valid assignment. *Jeffres v. Lampson*, 10 Ohio St. 101. Nor can the right of re-entry for a breach of a condition subsequent before the branch. *Ohio Iron Co. v. Auburn Iron Co.*, 64 Minn. 404, for that right is confined to the grantor and his heirs and can not be transferred by alienation. *Trask v. Wheeler*, 89 Mass., 109. Some early decisions, now overruled, decided that an expectancy could not be assigned without the ancestors' written consent. *Boynton v. Hubbard*, 7 Mass. 112, but the want of consent of an insane ancestor will not defeat the sale, *Hale v. Hallon*, 35 S. W. 843.

**BILLS AND NOTES—DRAFT ON FICTITIOUS PAYEE.**—SEABOARD NAT. BANK v. BANK OF AMERICA, 100 N. Y., SUPP. 740.—*Held*, that where a draft is drawn to the order of an existing firm, which did not know of its issuance, it was not drawn to the order of a fictitious payee under the Negotiable Instruments Law, Laws 1897, p. 724, c. 612, par. 28, subd. 3, unless the drawer had no actual knowledge of the existence of such firm and his intent was to make it payable to bearer.

The general rule that a negotiable instrument, made payable to a fictitious person or order is in effect, an instrument payable to bearer, applies only where it is so made with the knowledge of the party making it. *Armstrong v. Bank*, 46 Ohio St. 512; *Bennett v. Farnell*, 1 Camp. 130. The knowledge must be merely that the note is payable to the order of a fictitious person or of the maker. *Irving Nat. Bank v. Alley*, 79 N. Y. 536. In many jurisdictions, however, there are contrary *dicta*. Where a party executes a note to the order of a fictitious firm and thereafter the holder indorses the note in the firm's name, a bona fide indorsee may recover against the maker, even if the latter was ignorant of the fact that the firm name was fictitious. *Ort v. Fowler*, 31 Kana. 478; *Lane v. Krekle*, 22 Iowa 399. The same rule applies against the first prior indorser in case of a fictitious indorsee. *Forbes & King v. Esby*, 21 Ohio St. 474. The principle of liability where it is existent, rests, in all cases, on the ground of estoppel. *Norton on Bills and Notes*, p. 62, this principle having a very extended application, in order to further the credit and circulation of negotiable securities. *Story on Notes*, Sect. 80; *Frasier v. Massy*, 14 Ind. 382.

**BILLS AND NOTES—SEALED INSTRUMENTS—RECITALS.**—JACKSON v. AUGUSTA S. R. Co., 54 S. E., 697 (GA.)—*Held*, that in order to render a promissory

note a sealed instrument, it must be so recited in the body of the note. The mere addition of a seal after a signature is insufficient.

At one time a promissory note in printed form with the printed letters "L. S." contained in brackets after the maker's signature, as the only evidence that it had been sealed, was held to be a sealed instrument. *Giles v. Mauldin*, 7 Rich. Law 11 (S. C.). Proof of the signature of the maker of a note, is of itself presumptive evidence of a sealed instrument, *Merritt v. Cornell*, 1 E. D. Smith 335. Also it was held that a promissory note is properly sealed even though no scrolled seal be attached near the maker's name if it concludes with the words, "Witness my hand and seal." *McCarley v. Tippah County Sup'rs*, 58 Miss. 483. But now the tendency of the courts is to construe a promissory note as a sealed instrument only when both the body of the note is indicative of a sealed instrument and a scrolled seal is attached near the maker's signature. *Willhelm v. Partone*, 72 Ga. 898; *Carter v. Penn*, 4 Ala. 140.

**CARRIERS—NON-PAYMENT OF FARE—RIGHTS AND DUTIES OF PASSENGERS.**—*NORTON v. CONSOLIDATED RY. CO.*, 63 ATL. (CONN.), 1087.—*Held*, that a passenger who has been ejected from a trolley car for refusing to pay a cash fare, having presented a defective transfer, negligently issued, by carrier's agent, can merely recover nominal damages for such expulsion, but has a remedy for breach of contract.

The decisions on this subject seem to be in perfect accord. *Hibbard v. New York and E. R. Co.*, 15 N. Y. 455, laid down the doctrine "that the plaintiff who had a ticket not good for the trip he was making, and who declined to pay fare, cannot maintain an action for ejection from the train, but must look to the breach of contract." In a case where a passenger has a defective ticket, he should either pay his fare, or quietly leave the train and resort to his appropriate remedy for any damage sustained. *Peabody v. Oregon R. & Nav. Co.*, 21 Ore. 121; *Houston & Texas Cent. R. R. Co. v. Ford*, 53 Tex. 364. In *Chicago B. & Q. R. Co. v. Griffin*, 68 Ill. 499, it was decided that if a passenger is given a wrong ticket, it is his duty to pay a second fare and that his proper remedy is on an implied contract between him and the company.

**CONSTITUTIONAL LAW—RIGHT TO JURY TRIAL—JURY OF SIX PERSONS.**—*BETIGE v. TERRITORY*, 87 PAC. 897 (OKL.). *Held*, that a statute providing that a person charged with a misdemeanor may be tried in the probate court by a jury composed of six persons is in conflict with the Federal Constitution and is therefore void.

The federal courts and the courts of the territories construe the right to a trial by jury in criminal cases, guaranteed by the Federal Constitution, as meaning the right to have a jury of twelve persons the first time and in whatever court a person is put on trial. *Cooley's Constitutional Law*, 321. The rules adopted by the state courts, however, in construing the same provision in the constitutions of the several states are not so definite. By the weight of authority trial by a jury of less than twelve persons, even by consent, is mistrial. *Cancemi v. People*, 18 N. Y. 128; *Harris v. People*, 128 Ill. 585. But some jurisdictions hold that, in case of legislative enactment to that effect, trial by jury may be validly waived, especially as to misdemeanors. *State v. Worden*, 46 Conn. 349; *State v. Albee*, 61 N. H. 423. And in most states it is held that the right to trial by jury was not intended to apply to the pro-

secution of minor or trivial offences. *People v. Justices*, 74 N. Y. 406; *Byers v. Commonwealth*, 42 Pa. St. 89. Other courts make the distinction that it is valid to have a criminal trial without jury in the first instance when the defendant is given an unfettered right of appeal and trial by jury in the appellate court. *Jones v. Robbins*, 8 Gray (Mass.) 329; *Emporia v. Volmer*, 12 Kan. 622.

**CORPORATIONS—STOCK—CONSTRUCTION OF BY-LAW.**—*GELLERMAN v. ATLAS FOUNDRY AND MACH. CO., et al.* 87 Pac. (WASH.) 1059.—*Held*, that when, under a by-law of a corporation providing that the trustees may at their discretion declare dividends, a dividend is declared on the paid-up stock, a like dividend upon unpaid subscriptions for stock accrues and must be paid. *Root, Crow & Hadley, JJ. dissenting.*

This seems to be a new question in the American courts, though in accord with the English rule, *Cook on Stockholders and Corporation Law* § 540; *Oakbank Oil Co. v. Crum L. R.*, 8 App. 65. Its principle does not appear to be fully established in the United States, *Thompson v. Erie Ry. Co.* 42 How. Pr. 68 (N. Y.); *Bailey v. Hannibal etc. Ry. Co.*, 2 Fed. Cas. No. 736. Equity will prevent any discrimination in the distribution of dividends among stockholders of the same class. *Cratty v. Peorie Law Library Assn.*, 76 N. E. (Ill.) 707. The class is determined by a pledge of profits in favor of certain shares in preference to others. *Taft v. Hartford etc. Ry. Co.* 8 R. I. 310. Against the main case it is held that the discretion of the trustees is controlling, *Jackson v. Newark Plankroad Co.*, 31 N. J. T. 277; *Williams v. Western U. Tel. Co.*, 93 N. Y. 162, with which, in the absence of fraud the courts will not interfere. *Bryan v. Sturgis Nat. Bank*, 90 S. W. (Tex.) 704. The By-law is a part of the contract. *Hazleton v. Belfast, etc. R. Co.*, 79 Me. 410; under which no dividends "accrue" until they are declared by the trustees. *Parks v. Automatic Bank Punch Co.*, 14 Daly (N. Y.) 424.

**CRIMINAL LAW—EVIDENCE—EVIDENCE OF OTHER OFFENSES.**—*TOPOLEWSKI v. STATE*, 109 N. W. 1037 (Wis.)—*Held*, on a prosecution for theft, the state claiming that the accused had conspired with another to steal property, it was error to admit evidence that the accused had, prior to the occurrence in question, conspired with another person to steal prosecutor's property. In any transaction, evidence of a similar act is relevant only for the purpose of showing the intent. *U. S. v. Fleming*, 18 Fed. Reporter 907. Evidence of similar frauds on the part of the defendant is admissible for purpose of showing the *animus*. *People v. Hughes*, 36 N. Y. Supp. 493. In criminal prosecution, evidence should be confined to the offence charged, except where another act is so connected with it that its commission directly tends to prove some element of the alleged offense. *Paulson v. State*, 118 Wis. 89. Testimony as to a former offense in the same house, and with which the defendant was connected, is irrelevant, unless it shows *animus*. *Lightfoot v. People*, 16 Mich. 507. And it is not competent for the prosecution to place before the jury facts tending to show another distinct offence, so as thereby to raise a presumption that the party is guilty of the offence charged. *Lightfoot v. People*, 16 Mich. 507.

**CRIMINAL LAW—FAILURE OF DEFENDANT TO TESTIFY—COMMENT THEREON REVERSIBLE ERROR.**—*PERKINS v. TERRITORY*, 87 PAC. 297 (OKL.). *Held*, where the defendant is on trial, charged with the commission of a crime and fails to

testify in his own behalf, and the prosecution comments upon such failure to the jury, such comments constitute reversible error.

Prosecution has no right whatever to refer to the defendant, as to why he did not clear up the affair. *People v. Doyle*, 12 N. Y. 836. No language shall be used by the prosecution to give to the jury the impression that since the defendant did not testify, his guilt is established. *Wilson v. U. S.*, 149 U. S. 60. And the state cannot refer indirectly to the fact that the defendant did not take the stand, for it may cause in the minds of the jurors a presumption of guilt. *State v. Moxley*, 102 Mo. 374. *Austin v. State*, 102 Ill. 261. *Dawson v. State*, 24 S. W., 414.

**CRIMINAL LAW—LIMITING ARGUMENT OF COUNSEL—DISCRETION OF COURT.** *People v. Fernandez*, 87 Pac. 1112 (Cal.). *Held*, that an order of the court, limiting the time of the argument of counsel to one and three-fourth hours to each side, was an abuse of discretion, requiring a reversal, on it appearing that the counsel for defendant objected thereto, and showed that he could not complete his argument within the time limited.

The constitutional provision guarantying to an accused the right to be heard by himself or counsel, does not deprive the court of the discretionary power to limit the argument of defendant's counsel, to a certain length of time. *Peagler v. State*, 110 Ala. 11. The limitation is within the discretion of the trial court. *People v. Kelly*, 94 N. Y. 526. With this discretion the appellate court will not interfere unless it clearly appears from the record that the rights of the prisoner were prejudiced. *State v. Shores*, 31 W. Va. 491. What shall be an unreasonable limit depends upon the circumstances of the case, its complexity or simplicity, the amount and character of the testimony, the number of witnesses and time consumed in hearing the case. 12 Cyc. 569. The rule does not apply to arguments on motions and questions arising during the trial. *State v. Jones*, 117 N. C. 768. The courts of Montana, contrary to the general rule hold that in fixing in advance, the exact time needed cannot be correctly determined, and if the court so fixes there is error. *State v. Tighe*, 27 Mont. 327.

**CRIMINAL LAW—PLEA IN BAR—EXISTENCE OF COURT—STATE V. HALL**, 55 S. E. 806 (N. C.).—*Held*, an alleged plea to the jurisdiction of the court in a criminal case, alleging that the court was not lawfully constituted because the governor was out of the state at the time he directed the holding of the term, and signed the judge's commission, was a nullity, since the court could not pass on its own existence as a court.

Jurisdiction is the power to hear and determine a cause, the authority by which judicial officers take cognizance of and decide causes, *U. S. v. Arradondo*, 31 U. S. 691. The institution of a suit in a court that has no jurisdiction is null. *Mora v. Kusat*, 21 La. Ann. 754. The proper course is to dismiss the action and not direct a verdict for the defendant, as that would be an exercise of jurisdiction and not a disclaimer thereof. *Clark v. Car*, 45 Ill. App. 469. The doctrine of a *de facto* officer does not apply even though one is in possession of an office and exercising its functions with silent public acquiescence, though wrongfully in possession, is an officer *de facto* and his acts binding, *Ellis v. Deaf and Dumb Asylum*, 68 N. C. 423; for there cannot be a *de facto* officer without a *de jure* office. *Willard v. Pike*, 59 Vt. 202.

**DEATH-ACTION GROUNDS AND MEASURE OF DAMAGES.—WILMONT V. MCPADDEN**, 65 ATL. 157 (CONN.).—In an action for the death of a child, *Held*, that

plaintiff, if entitled to recover at all, may recover on the same grounds damages measured by the same rule as if the action had been brought by decedent in his lifetime.

Where a parent sues for damages resulting from the death of a minor child, evidence of the value of the child's services until it attained its majority, is admissible, though the recovery is not necessarily limited to the value of such services. *Pierce v. Connors*, 20 Col. 178. Where damages are claimed for the death of a child incapable of earning anything, or rendering service of any value, the value of its probable future service to the parent during its minority is a matter of conjecture, and may be determined by the jury without the testimony of witnesses. *Little Rock Ry. Co. v. Barker and Wife*, 39 Ark. 491. Evidence that the father required the services of his little child in order to maintain his household, was competent upon the question of damages. In this case the father recovered damages for death of seven-year old daughter. *Pressman v. Mooney*, 5 App. Hun., 121 (N. Y.).

**DIVORCE—DEFENSE—IMPLIED CONNIVANCE.—***DELANEY v. DELANEY*, 65 ALT. 217 (N. J.).—The plaintiff introduced his friend to the defendant and in the friend's presence charged her with adultery; subsequently by his acts and omissions, the plaintiff exposed his wife to the temptation of adultery with said friend and then alleging adultery to have occurred brought suit for divorce. *Held*, For a single act of adultery by a wife, a divorce will not be granted to a husband, who either connived at such act, or, in legal contemplation, consented to it. Gummere C. J., and Pitney, Swayze, Reed, Vroom and Green, J. J., *dissenting*.

The absence of due precaution may amount to criminal negligence on the part of the husband where the wife previous to marriage was seduced by her husband, and after marriage warnings in regard to the wife's conduct, calculated to excite his vigilance were given and no steps taken by him in consequence. *Dillon v. Dillon*, 3 Curt. Eccl. 86. A wife may plead the fact of cohabitation when single, with the husband, in order to show a want of proper vigilance on his part over her subsequent moral conduct. *Graves v. Graves*, 3 Curt. Eccl. 235. Where husband and wife by mutual consent separated after marriage the husband was deemed guilty of willful neglect conducing to his wife's adultery. *Hawkins v. Hawkins*, 54 L. J. P. and Adm. 94. A husband who seduces his wife before marriage, and after marriage sees her in a situation of temptation and does nothing to rescue her, and she yields, will be understood as having consented to her adultery. *Cane v. Cane*, 39 N. J. Eq. 140. If a husband knows of his wife's weakness, he is called upon to exercise peculiar vigilance and if he sees what a reasonable man could not see without alarm, and makes no effort to avert the danger, he must be supposed to see and mean the result. *Hedden v. Hedden*, 21 N. J. Eq. 61.

**DIVORCE—DESERTION.—***FOOTE v. FOOTE*, 65 ATL. 205 (N. J.). Where a husband separated from his wife with her consent which was later withdrawn, and he made no proffers to resume marital relations. *Held*, to constitute desertion it is not necessary that the intent should have been formed at the time the party left home, but it is sufficient if he afterwards determines to desert, and persists in such determination—Pitney, Swayze, and Green, JJ., *dissenting*.

Separation and intention to abandon must concur in order to constitute a ground for divorce. But they need not be synchronous. *Pinkard v. Pink-*

ard, 14 Tex. 356; *Reed v. Reed*, Wright 224 (Ohio). Desertion will begin at the time when a renewal of marital cohabitation is sought by the complainant. *Hankinson v. Hankinson*, 33 N. J. 66. But there are circumstances in which the law will justify a refusal to return. *Porritt v. Porritt*, 18 Mich. 420. The guilty intent is manifested when, without cause or consent, either party separates from the other, *Ingersoll v. Ingersoll*, 49 Pa. 249; and this has been held notwithstanding the husband contributed to his wife's support. *Magrath v. Magrath*, 103 Mass. 577. The conduct of the defendant may justify a finding of willful, continued, and obstinate desertion. *Carroll v. Carroll*, 68 N. J. Eq. 727.

EVIDENCE—JUDICIAL NOTICE—SCIENTIFIC FACTS.—*MACOMER v. STATE BOARD OF HEALTH*, 65 ATL. 263 (R. I.).—In an action to revoke a certificate to practice medicine evidence was introduced that the practitioner had advertised to produce certain results and cure of diseases with alleged electrical devices. *Held*, That the court could not take judicial notice that such claims were false but was bound to form its judgment on matters solely in evidence. *Blodgett, J. dissenting*.

The court is bound to take judicial notice of all matters of art and science which because of their public notoriety have been rendered axiomatic, *Bryan v. Beckley*, 12 Am. Dec. 216 (Ky.); even though the court may be actually uninformed regarding them. *Brown v. Piper*, 91 U. S. 37. But this power is exercised with great care and caution and every reasonable doubt resolved promptly in the negative. *St. Louis Gas Co. v. Am. Fire Ins. Co.*, 33 Mo. App. 348.

EVIDENCE—PAROL EVIDENCE EXPLAINING WRITINGS.—*LAMBERT HOISTING ENGINE CO. v. CARMODY*, 65 ATL. 141 (CT.).—*Held*, that on an issue as to whether a written contract was one for the sale of certain machinery or a lease thereof it was proper to admit evidence of negotiations leading up to the contract, for the purpose of determining the intent and purpose of the parties.

Parol evidence of the practical interpretation which the parties have by their conduct given to a written instrument is admissible in determining the intent and purpose of the contract. *St. Louis Gas Light Co. v. City of St. Louis*, 46 Mo. 121; *Emery v. Webster*, 42 Me. 204. And the statements and conduct leading up to the contract, *Rhodes v. Cleveland Rolling-Mill Co.*, 17 Fed. 426, as well as subsequent to it, *Potter v. Phoenix Ins. Co.*, 63 Fed. 382, and, in fact, where the direct evidence is contradictory as to the exact terms of the instrument, evidence of any circumstance bearing upon the point in controversy may be introduced to show the understanding of the terms by the parties. *Houghton v. Clough, et al.*, 30 Vt. 312. But the understanding which one party had, if not communicated to the other party, is not admissible. *Taft v. Dickinson*, 88 Mass. 553. The language mutually chosen to express the intention of their minds can be merely explained by parol evidence—"The question is not what did the parties mean to say, but what is the meaning of what they have said." *Bartholomew v. Muzzy*, 61 Conn., 387.

HIGHWAYS—PERSON CROSSING FROM STREET CAR TO CURB—CONTRIBUTORY NEGLIGENCE.—*GARSDALE v. N. Y. TRANSP. CO.*, 146 FED. 583 (N. Y.).—Plaintiff alighted from a street car, and after taking two or three steps was struck and injured by the defendant's automobile. *Held*, that the plaintiff was not bound as a matter of law to look in both directions along the street before starting to cross to the curb, but the question, whether the failure to so look, constitutes contributory negligence is one of fact for the jury.

Some of the Western and Southern states agree that a greater degree of diligence must be exercised by the driver of vehicles at a street crossing than is required of pedestrians. *Carter v. Chambers*, 79 Ala. 223; *Sykes v. Lawlor*, 49 Cal. 236. The general rule in this country and in England is, however, that their rights and obligations are correlative and each owes the other a duty to avoid accident. *Reens v. Mail & Express Pnt. Co.*, 30 N. Y. Supp. 913; *Baker v. Fehr*, 97 Pa. 70. And if such pedestrian crosses a city street where moving vehicles are numerous without looking in both directions along the street and is injured, he may be guilty of contributory negligence. *Barker v. Savage*, 45 N. Y. 191; *Belton v. Baxter*, 54 N. Y. 245. But if the plaintiff by the use of ordinary care, under the circumstances might have avoided the consequences of the defendant's negligences, and did not, the case is one of mutual fault and no recovery is allowed. *Cooley on Torts*, 2d Ed. p. 812 and cases cited; *Murphy v. Deane*, 101 Mass. 455. Yet, if the defendant discovered the negligence of the plaintiff in time, and by the use of ordinary care could have prevented the injury and did not do so, an action will lie against him. *Thomp. on Neg.* Vol. II., 1157. To have this rule apply, however, the negligence of the one must be subsequent to that of the other. *Bigelow on Torts*, 311; *Beach on Cont. Neg.*, 59. In all such cases this question of contributory negligence is generally one of fact for the jury. *Orr v. Garabold*, 85 Ga. 373; *Peltier v. Bradley Darn v. Carrington Co.*, 67 Conn. 42.

INDICTMENT AND INFORMATION—CONVICTION OF LESSER OFFENCE—STATUTORY PROVISIONS—*STATE v. MATTHEWS*, 55 S. E. 342 (N. C.)—*Held*, that under an indictment for murder in the first degree, the jury may find accused guilty of murder in the second degree.

Under an indictment for murder in the first degree, the accused may be convicted of any degree of murder, or manslaughter, for the unlawful killing of the identical person charged by the identical means charged in the indictment. *Keefe v. The People*, 40 N. Y. 384. One indicted in the usual form for murder may be convicted of manslaughter, because, if the averment that the killing was with malice aforethought be negatived or stricken from the indictment, there remains a sufficient charge of manslaughter. *Gishie v. The State*, 71 Wis. 612. Wherever a person is charged upon information with the commission of an offence under one section of the statutes, and the offence charged includes another offence under another section of the statutes, the defendant may be found guilty of either offence. *State v. Burwell*, 34 Kan. 312.

INSURANCE—SUICIDE BY THE INSURED—VALIDITY OF PROVISION—*THAXTON v. METROPOLITAN INSURANCE Co.*, 55 S. E. 419. *Held*, A provision in an insurance policy that if the insured, within one year from its issue, die by his own hand, whether sane or insane, the company shall be liable only for the premium paid, is valid. *Walker, J., dissenting.*

Where one person kills himself when his reasoning faculties were so impaired that he was unable to understand the consequence and effect of his act, or was impelled thereto by an irresistible insane impulse, the beneficiaries under the policy could maintain an action and the clause in the policy is void. *Mutual Life Insurance Co. v. Walden*, 26 S. W. 10, 12; *Insurance Company v. Atkins*, 150 U. S. 468. When one intentionally drowned himself with the knowledge of the consequence of the deed, the beneficiary could main-



tain an action irrespective of the clause in the policy. *Boileau v. Insurance Company*, W'kly Notes Cas. 145. When a person so unfortunate as to have his power of reasoning impaired and not to understand the moral character, the general nature, consequence and effects of the act he is about to commit, which he cannot resist, such death is not within the contemplation of the parties to the contract and the insurer is liable. *Life Insurance Co. v. Terry*, 15 Wall 508.

**INTEREST—COMPUTATION—COMPOUND INTEREST.—INHABITANTS OF TISBURY v. VINEYARD HAVEN WATER CO.**, 79 N. E. 256 (MASS.). *Held*, that where interest is to be allowed on money due, the computation is to be of simple interest, unless there is an express requirement to the contrary.

The common law rule, not to allow compound interest, has been generally followed in the United States, *Wilson v. Davis*, 1 Mont. 183; and compound interest is recoverable only when statutes so provide. *Denver Brick Mfg Co. v. McAllister*, 6 Colo. 261. But the law favors interest upon interest in special cases of fiduciary relations. *Wofford v. Wyly*, 72 Ga. 863. As in the case of decedent's solvent estate in payment of his debts. *Ellicott v. Ellicott* 6 Gill & J. 35. Or where money is withheld by reason of neglect or intentional misconduct of the debtor. *Rayner v. Bryson*, 29 Md. 473. And principal and interest may be aggregated to date of judgment and interest upon the aggregate reckoned from that date. *Stanton v. Woodcock*, 19 Ind. 273. However in the case of judgment on appeal interest is calculated on the principal of the original debt. *Tindall v. Meeker*, 2 Ill. 137. And compound interest is not recoverable on a bill to redeem a mortgage which is to secure an annual interest bearing note. *Kiltredge v. McLaughlin*, 38 Me. 513; *Hyde v. Brown*, 5 La. 33.

**LANDLORD AND TENANT — INJURY FROM DEFECT — CONTRIBUTORY NEGLIGENCE OF TENANT.—REAMS v. TAYLOR** (87 PAC. 1089) (UTAH.). *Held*, though a landlord break a covenant to cover a cellarway, he is not liable for injuries to a tenant who falls therein, where, knowing the nature of the defect, the tenant fails to exercise her right to repair the defect and deduct the expense from the rent, or to surrender the premises, and exposes herself to the risk of injury.

The cases in point seem to sustain this decision and one court goes so far as to state that when the plaintiff was fully aware of the facts the plaintiff's fault was as much responsible for the injuries as the defendant's. *Town v. Armstrong*, 75 Mich. 580; *Quinn v. Perham*, 151 Mass. 162. The question of contributory negligence forms the basis of these cases and it has been held that in order to support an action for negligent injury the plaintiff must prove himself free from contributory negligence. *Mahon v. Burns*, 34 N. Y. Supp. 91. It is even said that from the moment of transfer neither party is bound to improve on the premises and that if a landlord should enter for any such purpose the tenant might forcibly eject him. *Weir v. Simpson*, 2 Phila. 158. In one jurisdiction it was held that the landlord only had to make the premises fit for hiring purposes and that the tenant knowing of defects and not repairing them was guilty of contributory negligence if he sustains injuries by reason of said defects. *Daley v. Quick*, 99 Cal. 179.

**MASTER AND SERVANT—MACHINERY INSPECTION—DELEGATION OF DUTY.—CLARK v. GOLDIE**—109 N. W. 1044 (MICH.). *Held*, that the duty of a master to inspect machinery to determine its safety cannot be delegated but

his duty to inspect for the purpose of keeping the machinery in good order may be delegated and the employer absolved from responsibility to servants for an improper performance thereof.

Master's responsibility is determined by the character of particular act or omission to which the injury is attributable. *McElligott v. Randolph*, 61 Conn. 157. Duty of the master to inspect as to safety of machinery, etc., is a direct, personal and absolute obligation, *Lewis v. Seifert*, 116 Pa. 628; and if he delegates this duty to an agent and the agent fails in its performance, the master is responsible, *Ingebretsen v. Nord Duetscher Lloyd Steamship Co.*, 57 N. J. L. 400. This duty of the master goes beyond inspection of safety of machinery and extends to a reasonable, careful and skillful inspection in order to keep it in a proper and safe condition for work, *Ohio & M. Ry. Co. v. Percy*, 27 N. E. (Ind.) 479; and maintaining suitable instrumentalities for the performance of the work required, *Ford v. Fitchburg R. Co.*, 110 Mass. 240.

MASTER AND SERVANT — INJURIES — EXEMPTIONS FROM LIABILITY.—*ATCHISON, T. & S. F. RY. CO. v. FRONK*, 87 PAC. REP. (KAN.) 698.—*Held*, that under the Kansas statute a contract entered into by an employee exempting master from all liability for damages sustained in consequence of the negligence of the master, his agents, servants or employees, is against public policy and void. Burch, J., *dissenting*.

This decision is in harmony with other decisions of the state, *Railroad Co. v. Pearby*, 29 Kan. 169. The early trend of American decisions leaned the other way, *Mitchell v. Railroad Co.*, 1 Am. Law Reg. 717 (Pa.); *Farwell v. Railroad Co.*, 4 Met. 49 (Mass.). All the states are now practically unanimous in declaring such a contract void as against public policy. *Railroad Co. v. Orr*, 91 Ala. 548; *Roesner v. Hermann*, 8 Fed. 782 (C. C.). Such an instrument is void for want of consideration, *Purdy v. R. R. Co.*; 125 N. Y. 209. Such liability is not created for the protection of the employees simply but has its reason and foundation in a public necessity and policy, which should not be asked to yield or surrender to mere private interest or agreements, *R. R. Co. v. Spangler*, 44 Ohio State 471. In Georgia however, such contract is valid, if it does not waive any criminal neglect of the company or principal officers, *R. R. Co. v. Story*, 52 Georgia 461.

MUNICIPAL CORPORATIONS—PEANUT ROASTERS ON SIDEWALK—EXPLOSION.—*FRANK v. VILLAGE OF WARSAW*, 101 N. Y. Sup. 938. *Held*, that the maintenance by the owner of a store of a peanut roaster between the sidewalk and the street cannot be held as matter of law a public nuisance so as to make the village liable from injury to a pedestrian from the explosion thereof. Sprine and Williams, JJ. *dissenting*.

A legal nuisance has been defined as any unauthorised obstruction of the free use of the street, *Simon v. Atlanta*, 67 Ga. 618; while a public nuisance is any obstruction or encroachment upon the public street, *Columbus v. Jacques*, 30 Ga. 506, *State v. Carpenter*, 68 Wis. 165. That of the main case seems to be a mixed nuisance, as public in nature but productive of injury to a private individual. *Acme Fertiliser Co. v. State*, 72 N. E. (Ind.) 1037; such obstruction is a nuisance *per se*, *Robinson v. Mills*, 65 P. (Mont.) 114, *Webb v. Demopolis*, 95 Ala. 116, *Davis v. New York*, 14 N. Y. 506, for any injury for which the city is liable, *New Haven v. Sargent*, 38 Conn. 50, *Centerville v. Woods*, 57 Ind. 162, *Fl. Worth v. Crawford*, 74 Tex. 404. It is immaterial that the obstruction is not a fixture. *Cohen v. New York*, 113 N. Y. 532.

**NEGLIGENCE—PLACES ATTRACTIVE TO CHILDREN—GRAVES v. WASHINGTON WATER POWER CO.**, 87 PAC. 956 (WASH.). *Held*, that the fact that a public bridge was attractive to boys did not render an electric company liable for injuries to a boy received while climbing up a pier, and caused by touching one of the company's live wires.

This case brings up the exceptions which it has been attempted to ingraft upon the general rule that a landowner is under no duty to a mere trespasser to keep his premises safe, *Chicago K. & W. R. Co.*, 53 Kan. 279; *Gay v. Essex Electric St. R. Co.*, 159 Mass. 238; and upon the further principle that the fact that the trespasser is a child does not raise a duty where none otherwise exists, *Ritz v. Wheeling*, 45 W. Va. 262; *Frost v. Eastern R. R.*, 64 N. H. 220. This rule has been modified in some jurisdictions by decisions which declare that a property owner is liable when he has upon his premises machinery at once dangerous and attractive to children in places where they are likely to go. *Sioux City S. P. R. Co. v. Stout*, 17 Wall. 657; *Keefe v. Milwaukee & St. P. R. Co.*, 21 Minn. 207. But the doctrine of these so-called "Turntable Cases" has been sharply criticised and the tendency at present is to apply it with extreme strictness; *Twist v. Winona & St. P. R. Co.*, 39 Minn. 164; *Overholt v. Vieths*, 93 Mo. 422. Some courts have even gone so far as to repudiate this doctrine entirely and hold that the youth of a trespasser is not to be taken into consideration. *Daniels v. N. Y. & N. E. R. Co.*, 154 Mass. 349; *Walsh v. Railroad Co.*, 145 N. Y. 301.

**NUISANCE—INJUNCTION—CONFLICT OF EVIDENCE—SELIGMAN v. VICTOR TALKING MACH. CO.** 63 ATL. 1093 (N. J.). *Held*, an injunction should issue restraining the operation during the night of a manufacturing plant, which is proved to have prevented the plaintiff and his family from sleeping because of noises and vibrations produced by the machinery, even though residents in the same vicinity were not so affected.

The decisions on this question, as to when an injunction will be granted are not entirely in harmony. An injunction will issue to restrain the operation of steam machinery which jars and shakes the complainant's house so as to render it unsafe or unfit for habitation. *Dittman v. Repp*, 50 Md. 516. It is sufficient if the nuisance render life uncomfortable. *Howard v. Lee*, 3 Sandf. 281; *Catlin et. al. v. Valentine*, 9 Paige 575. Some courts hold that if the evidence be conflicting, and the injury be doubtful, that will constitute a ground for withholding the injunction. *Newark Aqueduct Board v. City of Passaic*, 18 Atl. 106; *McCaffrey's Appeal*, 105 Penn. 253; *Dumesnil v. Dupont*, 57 Ky. 800. In line with the case under consideration, it was held in *Filson v. Crawford et. al.*, 5 N. Y. Supp. 882, that the injury sustained because of the stamping of horses in defendant's stable was an actionable nuisance, though several witnesses testified that they heard little or no noise coming from the stable. *Rogers v. Elliott*, 146 Mass. 349 holds that the probable effect of the sound upon ordinary persons, and not upon a particular person, is the criterion upon which the granting of an injunction is to be determined.

**PARDON—CONDITIONAL RELEASE—RE-ARREST—STATE v. HORNE**, 42 So. 388 (FLA.).—*Held*, where a prisoner has accepted a conditional pardon and has been released from imprisonment by virtue thereof, but has violated or failed to perform the conditions subsequent, such pardon becomes absolutely void and the criminal may be re-arrested and compelled to undergo the remainder

of his original sentence even though the time of his original sentence has elapsed.

The pardoning power of the president in this country as specified in Act. II., Section 2 of the Federal Constitution is not subject to any legislative control. *U. S. v. Wilson*, 7 Pet. (U. S.) 150; *Ex parte Wells*, 18 How. (U. S.) 307. So also the governor, in all the states, either solely or with others, has the power to conditionally pardon persons convicted of crimes, other than impeachment and treason, by virtue of his state constitution. *People v. Potter*, 1 Park (N. Y.) 47. This pardoning power, however, is not necessarily an executive function, but resides where the Const. places it, and in the absence of legislation, it vests no more power in the executive than in the legislative or judicial department. *State v. Nichols*, 26 Ark. 74. One who claims the benefit of a pardon must be held to strict compliance with its conditions. *Haym v. U. S.*, 7 Cir. Ct. 443; *Warney v. U. S.*, 7 *id.* 501. Hence it is a general rule in England and in this country that the pardon, in the case of a condition precedent, does not take effect and in the case of a condition subsequent becomes void, and the criminal may be re-arrested and compelled to finish his original sentence, though the time of such sentence has elapsed. *Com. v. Halsfield*, 2 Pa. L. J. 37; *Cole's Case Moo K. B.*, 466. But if the condition annexed thereto is illegal or impossible the condition is void and the pardon becomes absolute. *Lee v. Murphy*, 12 Am. Rep. 563. In the absence of statute or express provision in the pardon the person charged with violating the conditions of his pardon has the constitutional right to be examined and tried like any other person charged with crime. *People v. Moore*, 62 Mich. 497. But the accused is not entitled to a jury trial, as a matter of right, except upon the question, whether he is the same person who was convicted. *Ex parte Alvarez*, 39 So. 481; *State v. Wolfer*, 53 Minn. 135. However, it has been held that the violation of a condition in a pardon is a question of fact and may be properly determined by the verdict of a jury. *People v. Burns*, 143 N. Y. 665.

PARENT AND CHILD—SUPPORT OF CHILD—LIABILITY OF PARENT.—SMITH V. GILBERT, 98 S. W. 115 (ARK.). *Held*, a parent is not liable for necessities furnished his child unless he has refused to furnish them, and one employing a child in spite of the objections of the parent who has not refused to furnish the child with necessities cannot, on being sued for the value of the services of the child deduct what he has paid the child, and which the child used in buying necessities,

In *Keaton v. Davis*, 18 Ga. 457 it was held that a father, in the absence of a reasonable and proper exigency, was not liable to a third party, who had supplied his son with medicine and medical attendance. Thus a father is not liable to a third party for necessities furnished his infant son without his authority to do so. *Brown v. Deloach*, 28 Ga. 486. But where the infant is under the authority of the parent, there must be a clear and palpable omission of duty, in that respect on the part of the parent, in order to authorize any other person to act for and charge the expense to the parent, *Van Valkenburgh v. Watson*, 7 Am. Dec. 395; 13 Johns 480. And no promise of the parent can be implied, where the infant leaves his parent's house in disobedience of her commands, and went to live with the plaintiff, under a contract that he should remain with the plaintiff until he should become of age. *Raymond v. Loyl*, 10 Barber 483. Therefore one who trades with an infant, and gives credit to him alone, knowing all the facts of the case, cannot sus-

tain an action against the father for necessities thus delivered. *Gordon v. Potter*, 17 Vt. 348.

**PLEADING—BILL—MULTIFARIOUSNESS—PRICKETT v. PRICKETT**, 42 So. 408 (ALA.).—*Held*, that a bill seeking to enforce a resulting trust in land, and on independent averments to have alimony decreed to the complainant, was demurrable for multifariousness.

Multifariousness is the improper joining in one bill of two independent and disconnected matters and thereby confounding them. *Story's Eq. Pl.*, 9th Ed. Section 271; *Daniell's Chancery Pr.*, 5th Ed. 334. There are two kinds of multifariousness, one as to the subject matter and the other as to parties. *Weston v. Blake*, 61 Me. 452. *Gartland v. Minn.*, 11 Ark. 720. The former is identical with the common law misjoinder. *Brown v. Bullsner*, 86 Va. 612; *Green v. Richards*, 23 N. J. Eq. 32. That is, in equity, misjoinder is a species of multifariousness. *Durling v. Hammar*, 30 N. J. Eq. 220. Under the code practice, however, the terms are used indiscriminately, but owing to the use of the term in these two senses it is more desirable to use the word multifariousness. *Behlow v. Fisher*, 102 Col. 209; *Emery v. Erskine*, 66 Barb. (N. Y.) 9. There is no inflexible rule as to what constitutes multifariousness in a bill. *Barney v. Lathan*, 103 U. S. 215; *Oliver v. Pratt*, 44 U. S. 333. It must be determined largely from the circumstances of the particular case, and even then depends much on the discretion of the judge. *Wash. City S. Banks v. Thornton*, 83 Va. 166; *Stevens v. Bosch*, 54 N. J. Eq. 59. So the uniting of a purely legal demand with an equitable demand in a bill has been held not demurrable for multifariousness. *Johnston v. Little*, 37 So. 592; *Wellsburg & S. L. R. Co., v. Panhandle T. Co.*, 48, S. E. 746. In some jurisdictions the test is whether the causes of action united in the bill require separate proofs and decrees. *Walker v. Powers*, 104 U. S. 245; *Holton v. Wallace*, 66 Fed. 409. Another test, more frequently employed, is whether the bill, fairly construed, shows a single object and seeks to enforce one general and common right. *Wells v. Bridgeport*, 30 Ct. 316; *Wood v. Sidney Sash, etc. Co.*, 92 Hun. (N. Y.) 22. A complete and satisfactory test would probably require a combination of both of these tests. *U. S. v. Guy-lard*, 79 Fed. 21; *Africa v. Knoxville*, 70 Fed. 739. Objection to multifariousness should always be taken by demurrer. *Pelham v. Edelmeyer*, 15 Fed. 262; *Bessell v. Beckwith*, 33 Ct. 357. In determining this question, however, the court cannot look to the answer or proof, but to the bill only. *Halstead v. Shepard*, 23 Ala. 558; *Eastman v. Savings Bank*, 58 N. H. 421.

**PUBLIC FUNDS—DEPOSIT OF SAME IN BANK—LIABILITY FOR LOSS.—STATE TO USE OF FENTRESS COUNTY v. REED ET AL**, 95 S. W. 809 (TENN.). *Held*, a county trustee depositing public funds in a bank, is not relieved from liability for loss resulting from the insolvency of the bank, by showing that he acted in good faith in selecting the bank.

In a few jurisdictions the rule of responsibility of bailees for hire has been applied to county treasurers, exonerating them from liability for the failure of bank in good standing at the time moneys were placed on deposit, *Cumberland Co. v. Pennel*, 69 Me. 357. But the weight of authority is to the effect that where the statute in general terms imposes a duty to turn over public moneys and there is no condition limiting that obligation, the obligation will be deemed absolute, 11 Cyc 447. Public policy requires that every depository of the public money should be held to a strict accountability, and the trustee

is liable even though the funds were stolen without fault on his part. *U. S. v. Prescott*, 3 How. 578. The state in prescribing the condition of the treasurer's liability has determined the nature and extent of the obligation assumed by him. *Ross School Fund Com. v. Hatch*, 5 Clark (La.) 199; and so there being no statute in South Carolina which imposes upon a county treasurer a higher obligation than that imposed by the common law, such officer is not liable for the loss of funds occasioned by the failure of the bank in good standing at the time moneys were deposited. *York County v. Watson*, 15 S. C. 1. He is not liable when loss results from act of God or the public enemy. *U. S. v. Thomas*, 15 Wall. 333.

**RAILROADS—CROSSING ACCIDENT—WILFULNESS.—PITTSBURGH C. & ST. L. RY. CO. v. FERRELL**, 78 N. E. (IND.) 988.—Plaintiff was struck and injured at a railroad crossing by defendant's passenger train going from fifty to sixty miles per hour. The crossing was used by from one hundred to one hundred and twenty-five teams daily. The whistle was sounded and the bell was rung in warning for a quarter-mile. The engineer did not see the plaintiff until the collision coming and the fireman not until the plaintiff was just about to drive on the track. The plaintiff's horse had approached at a brisk trot. *Held*, that such facts were insufficient to establish a wilful injury on the part of the railway company. *Robinson and Roby, JJ., dissenting.*

A complainant, in an action to recover damages for wilful or wanton injury by a railroad, must allege wilfulness or wantonness in causing the injury and not merely in the propelling of the train by the defendant. *Haley v. Kansas City, M. & B. R. Co.*, 113 Ala. 640. If the party injured is himself guilty of wanton and reckless conduct, he may not recover, even although the defendant's employees were also reckless or wanton in such a way as to imply a willingness to inflict the injury. *Georgia Pac. Ry. Co. v. Lee*, 92 Ala. 262. But a railroad company, which without precaution or warning sends cars across a public crossing under no control is liable for wanton and reckless negligence. *Lake Shore & M. S. Ry. Co. v. Johnson*, 35 Ill. App. 430. Where one recklessly and without regard to the consequences, inflicts an injury which he might have avoided, such conduct will imply wilfulness. *Pittsburgh, C., C. & S. Ry. Co. v. Judd*, 10 Ind. App. 213.

**RAILROADS—INJURIES TO PEDESTRIANS ON TRACK—CONTRIBUTORY NEGLIGENCE.—CRANCH v. BROOKLYN HEIGHTS R. CO.**, 78 N. E. 1078 (N. Y.). A pedestrian, intending to take passage on a train at a station was struck by a train which did not stop there. She saw the train approaching but walked ahead and stepped on the track without again looking for the train. *Held*, that she was guilty of contributory negligence as a matter of law. *Vann and Bartlett, JJ., dissenting.*

In general, in determining whether a person has been guilty of contributory negligence, it is held to be the duty of every person lawfully attempting to cross a railway, to stop, look, and listen for approaching trains. *Lehigh Valley R. Co. v. Hall*, 61 Pa. St. 361; *Dowdy v. Ga. R. Co.*, 88 Ga. 726. A passenger, however, has a right to rely upon a railway company to ensure the safety of its stations. Therefore, a passenger may cross tracks at stations without stopping to look and listen. *Chicago R. Co. v. Ryan*, 165 Ill. 88; *B. & O. R. Co. v. State*, 60 Md. 499. And a person going to the depot of a railway company to take passage on its trains, although not having purchased a ticket, is regarded as a passenger. *Grimes v. Penn. Co.*, 36 Fed. 72; *Texas & P. R. Co. v. Best*, 66 Tex. 116. But when such a passenger is injured in

trying to cross a railroad track in front of an approaching train which he actually saw, the rule appears to be different. *Chicago Railway Co. v. Chancellor*, 165 Ill. 438, holds that in such case, unless a person stops to look and listen immediately before stepping on the track, he is guilty of contributory negligence.

**SALES—BREACH OF WARRANTY—REMEDIES OF BUYER.**—*WHITE v. MILLER*, 109 N. W. (Iowa) 465.—Plaintiff purchased a cow with a calf "by her side," the sale being under a warranty to the effect that a cow with calf should be regarded as one animal, that the cow was a breeder and that, if the cow failed to fulfill the warranty, the "animal" might be returned and the price would be refunded. The cow not fulfilling the warranty, the plaintiff tendered her to the seller and then sued. *Held*, that the contract had fixed a remedy in case of breach of warranty and the plaintiff, not having tendered the calf could not recover. *McClain & Ladd, JJ., dissenting.*

When the parties have not stipulated as to the course to be taken on breach of warranty, the vendee has his election either to sue on the warranty or to rescind the contract by returning the property and suing for the purchase price. *McCormick & Bro. v. Dunville*, 36 Iowa 645. It is competent, however, for the parties to provide by contract that on failure of warranty, a particular course shall be pursued. *King v. Towsley*, 64 Iowa 75. If it is agreed that the thing purchased shall be returned before liability accrues, the purchaser, before he can recover damages must show a return, an offer to return, or a waiver by the vendor of such requirement. *David v. Gosser*, 41 Kan. 414. There are, however, minority *dicta* to the effect that, where a thing is sold under a warranty providing that the purchaser may return it, if the warranty fails after a specified time, the right of return is optional with the vendee and a right of action exists for a breach of warranty. *Moore v. Emerson*, 63 Mo. App. 137; *Saar, Scott & Co. v. Patterson*, 65 Minn. 449.

**SALES—CONTRACT FOR SALE AND DELIVERY OF COAL—WHAT CONSTITUTES EXCUSE FOR FAILURE TO MAKE DELIVERIES.**—*SAMUEL H. COTTRELL & SON v. SMOKELESS FUEL CO.*, 129 FED. 174 (VA.). *Held*, that a contract for sale and delivery of coal from a certain mine at specified prices which was subject to a provision that deliveries should be subject to strikes, which might delay or prevent shipment, would not excuse seller from performance, because of a strike which merely increases cost of production and cost to the seller.

Nothing will excuse the performance of an express contract which is neither unlawful nor impossible but the act of God, the law, or the other party to a contract. *Stees v. Leonard*, 20 Minn. 494. Thus, where a duty is created by a party's agreement, the party will not be excused from performance, though he is disabled without his own fault. *Mill Dam Foundry v. Harvey*, 38 Mass. 417 and in *D. L. and W. R. R. v. Bowns*, 36 N. Y. Super. Ct. 126, the seller was held liable for non-performance of a contract to furnish coal, which contained a provision that seller should be exempt from performance in case of a strike, it being shown that strike resulted from reduction in wage by seller, so *Budgett v. Binnington* 1 S. B. 35 holds that a dock strike affecting the labor engaged both by the shipowner and the charterer does not relieve the charterer from promise to have cargo unloaded at a specified time. A duty or charge made upon a party by his own contract is enforceable against him, notwithstanding any accident or necessity since he might have provided against same in contract. *Clark on Contracts*, sec. 250.

**TAXATION—PROPERTY SUBJECT TO TAXATION—PERSONAL PROPERTY OUTSIDE OF STATE—PEOPLE EX REL. A. G. HYDE & SONS V. O'DONNELL ET AL TAX COM'RS**, 101 N. Y. SUP. 610.—*Held*, that under Laws 1896 p. 795 c. 908, making personal property situated or owned within the state subject to taxation, property of a domestic corporation which was without the state, was not taxable, though such property was generally brought into the state to be sold. *Clarke & Scott, J. J., dissenting.*

The general rule is that the domicile of the owner determine the *situs* of personal property for taxation purposes. *Morgan County v. Walton County*, 121 Ga. 659; *Herron v. Keeron*, 59 Ind. 472; *Sagamon & M. R. Co. v. Morgan County*, 14 Ill. 164. The legislature may change this rule at will. *City of Winston v. Salem*, 131 N. C. 404, *City of Baltimore v. Safe Deposit & Trust Co.*, 97 Md. 659. The place of taxation has been limited to the permanent *situs* of tangible personalty. *Delaware L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341. *People ex. rel. Hoyt v. Tax & A. Comrs.* 23 N. Y. 224. Against the main case, it is held that the mere absence of a resident's personalty from the state does not affect its *situs*. *People v. Barker*, 83 N. Y. Sup. 33; to change which, a permanent location outside of the state is necessary. *People ex rel. P. M. S. Co. v. Coms. of Taxes*, 64 N. Y. 541.

**TELEGRAPH—FAILURE TO DELIVER A MESSAGE—PRESUMPTION OF NEGLIGENCE—BURDEN. SHEPARD VS. WESTERN UNION TELEGRAPH CO.**, 55 S. E. 704.—*Held*, Though negligence of a telegraph company will be presumed from a week's delay in delivering a message, the presumption may be rebutted, and it is not necessary that the rebutting evidence preponderate, the burden being on the plaintiff to show negligence.

Where there is an unquestionable delay in the transmission of a message, the burden of explaining the delay is on the telegraph company, *Julian v. Western Union Telegraph Co.*, 98 Ind. 327; *Telegraph Co. v. Griswold*, 37 Ohio State 301. The telegraph company must exonerate itself by showing how the delay occurred, and in absence of such proof, the jury will be authorized to presume a want of ordinary care and negligence on the part of the company. *Rittenhouse v. The Independent Line of Telegraph*, 44 N. Y. 263; *Tyler v. Western Union Telegraph Co.*, 14 A. R. 33. When a telegram is not delivered until more than three days have elapsed after its receipt, the burden is on the company to explain the delay. *Harkness v. Western Union Telegraph Co.*, 73 Iowa 190; *Sweetland v. Telegraph Co.*, 27 Iowa 433.

**TELEGRAPHS AND TELEPHONES—NEGLIGENCE—ACTION—PETITION—SUFFICIENCY—WESTERN UNION TELEGRAPH CO. V. ROWE ET AL** 98 S. W. 228 (TEX.). *Held*, where in an action against a telegraph company for delay in transmitting a message, the petition alleges facts sufficient to show a contract to submit and deliver a message, though it does not allege a contract was made.

It has been held that a person to whom a telegram is addressed may maintain an action for the failure to forward and deliver promptly, on proof that the sender acted as his agent and that the telegraph company knew of the fact. *Western Union Telegraph v. Wilson*, 93 Ala. 32; 30 Am. St. Rep. 23. But if the complaint shows that the defendant, who was engaged by the plaintiff undertook to transmit the message, the mutual obligation of the parties is sufficient to maintain the action, although it was not alleged that anything was paid for the message. *Western Union Telegraph v. Meech*, 49 Ind. 53. Damages, which are recoverable are direct damages, resulting



from a breach of contract, which the parties to the contract would have contemplated as flowing from its breach, if at the time they were fully informed of the facts. *Western Union Telegraph Co. v. Pells*, 8 Ky. Law Rep. 531. Whether it is sufficient to maintain an action against a telegraph company, which undertook to transmit a message, without alleging that delivery was within office hours, see *Western Union Telegraph Co. v. Jump*, 2 Wilson Civ. Cases, Ct. Appeals, Article 41. But a petition in an action against a telegraph company for failure to deliver a message which alleges that the message was given to defendant's agent by telephone, and a contract made to send it, and that it was the custom of defendant's employees, known to defendant, to receive such messages by telephone is not bad for want of an averment that the message was in writing, *Texas Telegraph and Telephone Co. v. Seiders*, 29 S. W. 258; 9 Tex. Civ. App. Article 431.

WITNESSES—LEADING QUESTIONS.—*STATE v. WATERS*, 109 N. W. 1013 (Ia.). *Held*, that, where on a prosecution for statutory rape, prosecutrix was reticent in giving her testimony, leading questions were proper.

The general rule is that leading questions are not allowed in the direct examination; *U. S. v. Dickinson*, 2 McLean 331; *Greenleaf on Evidence*, §434; *Wigmore on Evidence*, 769; unless the witness is hostile. *Bradshaw v. Combs*, 102 Ill. 428. And leading questions are allowed if the witness is biased, *Stratford v. Sanford*, 9 Conn. 283, or is unwilling, *State v. Benner*, 64 Me. 279, or weak minded, *Armstead v. State*, 22 Tex. App. 59, or surprised the examining attorney with his answers, *St. Clair v. U. S.*, 154 U. S. 150. At the discretion of the trial judge a full disclosure of witness' knowledge may be elicited. *Towns v. Alvord*, 2 Ala. 380. *Brassell v. State*, 91 Ala. 45, is directly in harmony.

## REVIEWS

*The International Law and Diplomacy of the Russo-Japanese War.*

By Amos A. Hershey. New York. The MacMillan Co., 1906.  
Pages 394. \$3.

The Russo-Japanese war had a unique interest to students of international law. It was the first and still remains the only war since the Hague Conference of 1899, in which both parties were adherents to the conventions framed by that Conference.

It was therefore fair to expect that it would be conducted with more regard both to humanity and to the principles of international justice, than has been apt to characterize such conflicts between nations in former days. Professor Hershey, who holds the chair of Political Science and International Law in Indiana University, has done a real service in recounting the general course of this war so far as it may illustrate the development of those branches of jurisprudence, and giving us the benefit of his own conclusions. These are expressed with moderation, and, if favorable on the whole to the Japanese contentions, are hardly more so than the judgment of at least Anglo-American public opinion.

Did Japan transgress any recognized rule of international obligation when she struck at Port Arthur before any formal declaration of war? Professor Hershey is of opinion (pp. 60, 61, 66) that the notice which she gave Russia on February 6 of her reserved right to take such action as it might deem best to protect her own interests was under the circumstances enough to justify her naval attacks on February 8. The telegraph in our times is a swift and certain messenger, and if Russia had not anticipated war as a probable result of its refusal of Japan's overtures toward a settlement, it was her own fault.

Professor Hershey considers the protest of Russia against Japan's forcing Korea to admit her troops, at the outset of the war, as theoretically sound but practically absurd (p. 72). Neutral territory, for the control of which a war is being fought, can hardly expect to be left in peace by either belligerent. Nor can it be forgotten that Korea had been for a considerable part of its more recent history practically under Japanese control, and was but fifty miles away from the island empire.

The author does not think our government failed in the duty of neutrality by doing nothing to check popular but private subscriptions in aid of the Japanese (pp. 84, 87). Here again the question is one of practice. Too much weight, he thinks, has been accorded to some observations which have fallen from the courts on this subject. The tendency of law students and perhaps of publicists is to search for particular judicial precedents, rather than for the general practice of nations, and that it encourages this tendency he deems "one of the gravest objec-

tions to the teaching of International Law mainly or exclusively by the use of the 'case system'" (p. 85).

The Russian assertion of a right to treat newspaper correspondents, making use of wireless telegraphy on the high seas, as spies, the author considers not only as contravening the Hague Convention of 1899 as to the rules of Land Warfare, but as wholly against sound reason (pp. 118, 121). The opinion of the Institute of International Law (p. 135) expressed at Ghent in September, 1906, is to the same effect. In respect to the general instructions to their commanders by both governments regarding the conduct of military operations, Professor Hershey justly emphasizes (p. 294) the fact that they are the expression of an advancing civilization, which is gradually stripping war of many of its horrors.

As to the vexed question of limiting the supply of coal furnished to belligerent men of war visiting a neutral port, he ranges himself with those who would confine it to no more than will take them to the nearest convenient port, at which they can safely call (pp. 89, 214).

The style of the treatise is clear, the arrangement simple and the index full.

S. E. B.

*The First Year of Roman Law.* By Fernand Bernard. Translated by Charles P. Sherman, D. C. L., Oxford University Press.

The title of this volume reveals its true purpose. It is not intended to be a comprehensive work on Roman Law, but a first year book, setting forth many of the essential facts of the subject in a brief and interesting way, to be followed by the study of a second year book by the same author, not yet accessible in English translation. As Professor Bernard states in his preface, this book, in spite of its restricted dimensions, is not intended to be one of those lifeless skeletons of the subject so much employed abroad as brief digests for the cram of preliminary examinations in Roman law. It is a book by which one may well begin his acquaintance with the subject and, notwithstanding its modest size, the volume is peculiarly satisfactory in its content, in that it embodies modern doctrine and the results of recent scholarly research. It should be said that the author has followed very closely the teaching of the law faculty of Paris and that he has therefore laid under contribution only five contemporaneous writers, Cuq, Girard, Esmein, Gérardin, Jobbé-Duval. In clinging too exclusively to French authorities, however, there is always the danger of yielding too much to their brilliant speculations regarding those institutions which are to a greater or less extent being affected in the present day by the discovery of new sources. For the interpretation of the legal papyri, which have already shed much new light on many phases of legal history and the details of legal transactions, there is need of vast philological and legal knowledge, as well as most conservative judgment. In this field one cannot safely disregard the import-

ant and brilliant work of such investigators as Mitteis and Gradenwitz.

Our author has divided the subject matter of his work into seven books, each with its appropriate subdivisions and titles. Following the usual pedagogical method of the Civilians, the first book is devoted to the external history of the Roman law and to an outline of Roman constitutional history. The traditional division into periods is followed. In a compendious treatment of the law of Rome, it is most difficult to determine upon a method which will embrace the changes in the law wrought by important developments in legal history and yet to give a consecutive and logical exposition of legal institutions. We think the author does well to begin with an outline of the Roman constitution and with an insight, though necessarily brief, into the legislative functions of the Roman government, but it does not seem to be worth the space required, to discuss the ethnic divisions of the early inhabitants of Rome. The latest historical research has amply shown the apochryphal character of much of the legendary history of Rome, and any space occupied by discussion of the three tribes, Ramnenses, Titienses and Luceres, a purely arbitrary division, having no legal significance whatever, might be reserved for more important matters. Granting that the whole question of the origin of clients and plebeians is still unsettled, we are somewhat startled to find it put dogmatically that the plebs did not appear until the second century of Rome (§16), a statement difficult of proof, whose value is somewhat impaired by a later remark that the origin of the plebs is quite problematical. In the discussion of the function of the praetor in the development of law such a statement as "the legislative activity of the praetor" (§49) might easily mislead the beginner. As Prof. James Bryce has well shown (*Studies in Jurisprudence and History*), the praetor did not "legislate," but assisted in the development of principles through his control of procedure. This prerogative of the praetor, growing out of his *ius edicendi*, was shared by him with all the higher magistrates of Rome. That "all these magistrates have the *ius honorum*" (§50) in explanation of the term *ius honorarium* is confusing. The *ius honorum* is the right of eligibility to office, without which one could not clothe a magistracy. From this *honor* (office), the system of legal principles which, by interpretation, grew up around the praetorian edict especially, was called *ius honorarium*.

In describing the duties of the jurisconsults it is somewhat questionable interpretation to ascribe to them the duty "to act in court for their clients" (*agere*). This has a modern sound, whereas the legal profession of Rome was so unlike that known to us, in more than one particular, that it requires careful explanation. From the earliest times, "acting in court" in behalf of clients was performed by the *patronus*, as a duty, and in later times by professional advocates, who were not regarded as belonging to the profession of jurists. In fact, they were gener-

ally ignorant of questions of law. This is the point of the rebuke given the orator, Servius Sulpicius, by the jurist Mucius Scaevola, when consulted on a point of law, '*turpe esse patricio et nobili et causas oranti ius in quo versaretur ignorare*' (Pompon. Dig. 1, 2, 43).

The remaining six books of the volume are devoted respectively to Persons, Things, Actions, Ownership, Successions, Donations *inter vivos* and Mortis Causa. Inasmuch as the translated work is intended to be of service to the American student in guiding him in his first acquaintance with Roman law, it is to be regretted that there is no book devoted to Obligations. This omission is explained by the fact that this important subject is reserved by the French law faculty for the instruction of the second year. To us, however, no part of the Roman system is so illuminating and valuable as the refined and lucid treatment of the obligations growing out of contract, as discussed by the great jurists in the Digest.

It is in the clear, succinct and yet withal, interesting style that a large part of the volume's excellence lies. There is comparatively little in the subject matter to awaken adverse criticism. Some statements tend to raise a query, perhaps, because of their brevity. For example, the statement of the principle by which ownership is determined in cases of *specificatio*, *confusio* and *commixtio* is not entirely adequate. The rule "*accessio cedat principali*" scarcely assists in cases of *confusio*, as, for example, the mixing of two kinds of wine of equal quality. Which is the *res principalis*? In *specificatio* the general rule is that he who does the work which transforms the property of another into a new object usually acquires the right of ownership to the new product, while in case of the union of things inseparable, as wine and wine, joint ownership of the whole mass is commonly produced. On the other hand, in *commixtio* of things separable, no change of ownership occurs. The author's statement of these difficult principles is scarcely distinct enough for an elementary treatise.

Passing on to the translator's share in the work, the introductory note informs the reader, in a somewhat labored sentence, that "the object of this labor of love is to place in the hands of students, and of others who desire an acquaintance, readily obtained, with the Roman law, an English version of a French work, designed for use in the law schools of France, which is remarkable for several excellencies that adapt it to become perhaps the best elementary treatise for commencing the study of Roman law." In view of this statement, we are justified in expecting the translator's work to present a high degree of excellence, preserving the lucidity and something of the charm of style of the original. To translate or publish any work on Roman law for English readers is certainly a labor of love, and for that reason may merit most courteous treatment. The difficulty of rendering into the English language the technical expressions of a legal system so different from our own is so great

as to convince some authors that the Latin terms must be retained without attempted translation. In this matter, Dr. Sherman has shown discretion and has not allowed himself to be tempted too far by the example of the original French, since a French writer on Roman law finds it easy and natural to adopt the Roman terminology by reason of the Latin characteristics of his own language and the Roman origin of the bulk of his legal system. In attempting to preserve the terse and almost telegraphic style of the French original, the translator has in many places strained the idioms of our tongue beyond the point of endurance, retaining French order and vocabulary to such an extent as to obscure the meaning, without recourse to the original French. Except for a temporary loss of Sprachgefühl for his native English while working under the spell of Dr. Bernard's brilliant diction, such expressions as the following could scarcely be accounted for in any English work: "the name so familiar of Quirites is applied therefore to the patricii alone" (*le nom si connu de quirites s'applique*, §5); "according to the historians, at this time commissioners charged with studying Hellenic laws should have been sent into Greece" (*on aurait envoyé*, §35), meaning that according to the traditional account commissioners were sent, etc.; "so the senate, before the time of Tiberius, should legislate but rarely" (*aussi n'a-t-il dû légiférer que bien rarement*, §43), meaning that the senate did legislate but rarely, since the statement has just preceded, that the senate did not have the right to make law; "the discovery of some pure sources has permitted the recovery of many of them" (*la découverte de quelques sources pures a permis d'en relever beaucoup*, §97), meaning that the discovery of original sources has made possible the correction of many erroneous interpolations in the Digest; "free marriage did not cease becoming general" (*le mariage libre ne cessa de se généraliser*, §248), meaning that free marriage became more and more usual; "*arrogatio* presented a special importance" (*présentait une gravité particulière*, §300), meaning arrogation was especially important; "*res Mancipi* would have constituted" (*auraient constitué*, p. 135, n), meaning that *res Mancipi* constituted the *familia*; "but a false idea, and above all scarcely Roman, would be given of obligations" (*seulement on se ferait une idée fausse et surtout peu romaine, des obligations*, §442); "it (*traditio*) will not transfer ownership only as often as the *tradens* shall have had the intention to transfer ownership" (*elle ne sera translatrice de propriété qu'autant que*, §636), where the *not* should certainly be deleted and *only as often as* should then read *only when the tradens*, etc. Passing on to the testamentary substitution of heirs, this gallicized English statement would certainly puzzle a reader without recourse to the original text: "resulting from the unlimited importance which the Romans attached to not dying intestate, they became ingenious to avoid by every means that their succession, by predecease, repudiation, incapacity of the heir, should become vacant" (*étant donnée l'importance sans bornes que les Romains attachaient à ne pas mourir intes-*

*tats, ils devaient s'ingénier à éviter par tous les moyens que leur hérédité . . ne demeurât vacante, §756).* The value and purpose of an elementary text book are certainly impaired, if not altogether destroyed, by inaccurate statement or by a lack of clearness and directness of expression, and our purpose in citing several of the foregoing passages is to show the need of revision in a second edition of this volume. There are several slips of different kinds in the original, and although the translator has corrected some of them, he has retained a number of errors in his translation, *e. g.*, there is constant wavering, in the translation and in the original, in the name of Augustus' act directed against "race-suicide," the famous *lex Papia Poppaea*. Likewise in both books occur *perduellio damnatus (perduellionis)*, *collo ve, spondes ne, tigni immitendi, proemia (praemia)*. Such words as *conditionibus* and *tralatitium* are no longer found in critical Latin texts. If the author yields to the demands of simplified spelling in such words as *edile*, one may ask, why not *pretorship* in the same paragraph (45)? Or with Paulus Emilianus, why not Julius Cesar? All agree nowadays that the latter's praenomen should be written Gaius, not Caius (§214). The English reader unacquainted with French will be puzzled with the name, Boèce, commentator on Cicero's *Topica* (p. 46, n. 1) and Denys of Halic. (p. 84, n).

It is to be regretted that so many misprints, especially in foreign words, escaped the proof-reader's eye: *ius civili* (p. 42, n. 1), *Mallius*, Catiline's confederate (§221), *lege egere* (§371), *Heracium* (p. 128, n. 1), *dii superii, res sancta* (§425), *Poetelea* (§436), porcedure (§464) *niki* (§449), 254 B.C. (§234, p. 155, n. 4), *vocatio in iure* (§499), *die Civilprocess* (p. 161, n. 1), *hunc ago* (§604), *des römischen* (p. 207, n. 3), *Czylarz (Czyhlarz)*, *aquaehaustus hauriendae* (§684, 2), *argum* (§723), *caduciariae* (§755), *lex Voconia*, 269 B. C. (§169).

With the removal of these *errata* and some of the blemishes in the matter of translation, this book may safely and with profit be put into the hands of beginners with a confidence that the presentation of a subject, vast and intricate, may be found attractive and intelligible in this manual.

Every aspirant to the study of Roman law may well start with the firm conviction that to pursue this subject first hand, he must have a sound knowledge of the Latin language and considerable acquaintance with Roman history and institutions. Without this equipment he may derive some knowledge of the elementary principles of Roman law from English manuals, such as the one under consideration, but in making use of such acquirement for comparison with the English system or the understanding of the law of our colonial dependencies, he must always remain on slippery ground unless he has recourse to original Roman sources.

*James J. Robinson.*

*Law of Nuisances.* Joseph A. and Howard C. Joyce. Matthew Bender & Co., Albany, N. Y. Law Canvass, pp. 972.

The authors of this work have furnished to the profession a decidedly up-to-date exposition of the law of England and this country on this subject. Beginning with a comprehensive list of definitions of the word "nuisance" the end is devoted to a chapter subdivided into Remedies, Parties, Defenses and Damages. About 3,500 cases are cited and a noticeable feature of the work is the care used in not only stating propositions concisely, but also in citing cases directly in point as authority for the principle laid down. There can be nothing more aggravating to the busy lawyer than to jot down a lot of citations only to find a large percentage of them inapplicable. A very complete and well arranged index shows the endeavor to make it possible to turn to any topic of the work at once. Such important questions as smoke nuisances, water rights, sewage cases and municipal powers and liabilities are dwelt on at length and, in some instances, as in the Chicago drainage canal case, much of the decisive part of the court's opinion is stated. That so much meaty matter has been condensed in a comparatively small book is the best proof of the large amount of well applied and successful work which the compilation of this volume must have involved.

F. P. M.

*The American Lawyer.* By John R. Dos Passos of the New York Bar. Banks Law Publishing Co. About 190 pages, Buckram. \$1.75.

When a man of the recognized standing and ability of John R. Dos Passos gives his views on the American lawyer "As he was, as he is, and as he can be," one is assured of a forceful statement of original ideas. Already the author of a number of valuable works on the law, his latest contribution is very timely and ought to be welcomed and read by all whether lawyer, student of the law or those members of the general public who appreciate first-hand information on a subject as to which there is much misconception. In the opening chapters some rather startling comparisons are made between the lawyer of to-day and his predecessors of ante-bellum days. The average modern lawyer's unfamiliarity with basic constitutional principles and his consequent inefficiency as a legislator are dwelt on at length and to this the author ascribes the major part of the unconstitutional legislation which encumbers our statute books. In New York State alone 109 such cases are cited—and these only by way of illustration.

Under "Duties" of a lawyer the ethical side of the profession is touched on and Lord Brougham's reverberating statement in the Queen Caroline trial is referred to as "wholly, unmitigatedly and disastrously bad." Under "Causes and Remedies," eleven suggestions are made for the improvement of the profession. Most of these would undoubtedly express the wishes of the aver-



age member of the Bar while others will be received, perhaps, rather coolly as, for instance, his 10th suggestion that the English idea of a division into two classes, Attorneys or Solicitors and Counselors and Barristers be adopted in the United States. That this system has many undesirable and perhaps evil features will be readily admitted. Code procedure and Codification in general are now and have been more less deprecated by leading members of the Bar, but it remained for this author to assert that (p. 170) "the difference between a common law lawyer and the practitioner under the code is the difference between a surgeon and a butcher." It seems also a little broad to say (p. 171) that "instead of seeking the truth, the Courts and the Bar are engaged in the pursuit of technicality and form."

A careful reading of the book, which is made a pleasure by the use of large, clear type and excellent paper, indicates an earnest attempt by Mr. Dos Passos to ward off the acceptance by lawyers of certain pernicious principles of conduct which the changing conditions of society and business would almost seem to warrant.

*F. P. M.*

SCHOOL AND ALUMNI NOTES.

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The Joseph Parker Prize, of the value of one hundred and twenty-five dollars, established by the will of Miss Eliza T. Parker in 1898, is offered for the best thesis on a subject connected with Roman Law. This prize is open to any member of the School at graduation from either the undergraduate or graduate course.

Parker Theses must be handed to the secretary of the Law School on or before May 1, 1907. For the year 1907, competitors may write on any one of the following subjects:

1. *Receptio Arbitri* or *Compromissum* as compared with Modern Arbitration.
2. The Influence of Christianity upon Roman Law.
3. The Use of Fictions in Roman Law.
4. *Affinitas* as affecting *Connubium* together with English Law Analogies.
5. The *Regula Catoniana*.
5. Contracts of Minors as viewed by Roman and English Law.

Students preferring to investigate any other subject in Roman Law of equal difficulty and importance, may be allowed to substitute that with the approval of Professor Baldwin.

Officers for the Class of 1907 have been elected as follows: President, George Elton Parks, Providence, R. I.; Vice-President, G. B. Van Kirk, Washington, D. C.; Secretary and Treasurer, Charles W. Evarts, New Haven, Conn.; Editor of the *Yale Shingle*, Joseph M. Forsyth, Franklin, N. Y.

Officers of the Kent Club for the winter term have been elected as follows: Ferdinand D'Esopo, '07, president; W. J. McKenna, '08, vice-president; Henry J. Colnan, '09, secretary; Robert N. Crane, '07, treasurer. The following compose the executive committee: Ferdinand D'Esopo, M. R. Davis, R. H. McIniston. Alexander Cumming, critic; Charles A. Smythwick, assistant critic.

The Wayland Club recently elected the following officers: William J. Maher, '07, president; Charles N. Harmon, '08, vice-president; Edward C. Weyman, '09, secretary.

At the semi-final debate held recently, Walter P. Armstrong, '08, Saul Berman, '08, and Paul R. Stinson, '07 were chosen as three of the six men from the different departments of the University from which number the team of three and three alternates will be chosen to represent the University in the annual Yale-Princeton Debate to be held March 22nd.

The Law School Catalogue for the year 1906-1907 is now out and copies may be had upon application to the Registrar or to the Secretary.

Walter B. Clarkson, Professor in the Law of Contracts in the Yale Law School during the years 1902-1904, and now engaged in the active practice of law in Jacksonville, Fla., was one of the organizers of the recently formed Florida State Bar Association. Professor Clarkson originated the Florida Law School in 1904, this now having an enrollment of twenty-five students.

The Law School Society of Corbey Court and Phi Delta Phi announces the following elections:

Joseph Marion Forsyth, 1905, 1907 L. S., of Franklin, N. Y.

Paul Augustus Schlafley, St. Mary's College, 1905, 1908 L. S., of St. Louis, Mo.

Theodore Marburg Crisp, 1909 L. S., of New York City.

'63—Judge Simeon E. Baldwin of the Law School was appointed by Governor Woodruff of Connecticut on January 15th to be Chief Justice of the Supreme Court and Judge of the Superior Court for eight years from the time of appointment.

'71—William L. Bennett of New Haven was appointed by Governor Woodruff on January 15th to be Judge of the Superior Court from September 9th, 1908.

'79—James T. Andrews of Hartford was appointed by Governor Woodruff to be Judge of the Superior Court for eight years from date of appointment.

'81—Livingston W. Cleveland has retired as judge of probate for the district of New Haven and announces his return to the general practice of the law.

'83—Howard J. Curtis has been appointed by Governor Woodruff, Judge of the Superior Court for the usual term of eight years.

'84—A recent number of the *ALUMNI WEEKLY* has this to say of Judge A. McClellan Mathewson: "The renomination of Judge

A. McClellan Mathewson for the New Haven City Court will result in keeping in place an official who has made an enviable record and whose good work should be continued. Judge Mathewson has brought correct principles and a large ability to this work and is a leader in the right direction."

'96—Charles B. Waller was appointed chairman of the committee on Contested Elections and second on the Judiciary committee at the organization of the Connecticut State Senate.

'98—Morris Sheppard of Texarkana, Texas, is representing that town in the House of Assembly of that state.

'99—Ernest C. Simpson was appointed by Governor Woodruff of Connecticut to be judge of the Common Pleas for New Haven County, for the term of four years from September 9, 1908.

'99—Charles O. Huberich, Associate Professor of Law and Acting Dean of the Law Department of the Leland Stanford, Jr. University, has been promoted to a full professorship in the same institution.

'00—Major Ernest L. Isbell of the Second Regiment, New Haven, has been elected Treasurer of the National Rifle Association of America.

'01—Frederick A. Robertson is a member of the recently organized firm of Scoppa and Robertson, located in the Poli Building, 23 Church Street, New Haven.

'02—John B. Pew and W. W. Goodwin have formed the law partnership of Borland, Goodwin and Pew, with offices at 601-603 New York Life Building, Kansas City, Mo.

'02—Born on January 11th, 1907, a daughter to Mr. and Mrs. Frank W. Tully, at Chestnut Hill, Boston, Mass.

'03—D. C. L. Chung Hui Wang recently received the Imperial degree of Doctor of Literature.

'03—George Woodruff, grandson of the first president and son of the second president of the First National Bank of Joliet, Ill., was recently elected president of the bank to fill the vacancy caused by the death of his father.

'03—George I. Bickley, of Pittsburg, Pa., has been appointed district agent of Northwestern Pennsylvania for the John Hancock Mutual Life Insurance Company of Boston, Mass., with offices at 314-15 Mears Building, Scranton, Pa.

'03—Louis Scoppa is a member of the recently organized firm of Scoppa & Robertson, engaged in the general practice of law at 23 Church Street, New Haven, Conn.

'04—Henry C. Andrews, who is engaged in the general practice of law at Jacksonville, Fla., has been appointed an Instructor in the Law of Contracts in the Florida Law School.

'04—Clarence W. Bronson desires to announce that after spending two years as assistant clerk of the Probate Court for the District of New Haven, he has resumed the general practice of law with office at Room 6, Mitchell Building, 828 Chapel Street, New Haven, connecting with offices occupied by Judge L. W. Cleveland.

'05—Frank E. Bollman is now practicing law with the firm of Bollman and Bollman, 823 Chapel Street, New Haven, Conn.

'05—Elmer H. Lounsbury and William W. Bent have formed a partnership for the general practice of law, with offices in the Connecticut National Bank Building, Bridgeport, Conn.

'06—Edgar L. Pond is now engaged in the general practice of law at Terryville, Conn.

'06—Vivian M. Carkeek and Donald A. McDonald have formed a partnership for the general practice of law, the firm name to be known as Carkeek & McDonald, and having offices in the Empire Building, Seattle, Wash.

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## THE EXEMPTION OF PRIVATE PROPERTY AT SEA FROM CAPTURE IN TIME OF WAR.\*

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We all rejoice to note the progress, during the last forty years, of the cause of international arbitration. This Association from the outset has given its best help to that movement. But, undoubtedly, the same period, even to its close, has proved that war is still an event which must be expected to recur. It has seemed to me, therefore, neither useless nor unseasonable, in the cool atmosphere of present peace, favoring fair discussion, to submit to this Conference a few remarks upon the subject of a change in the rules of maritime warfare which has received considerable support in many quarters. It is an important as well as a very debatable topic. I dare to hope that everyone here will try to examine it, so far as is justly possible, from a cosmopolitan standpoint, and not merely, or chiefly, in relation to the supposed gain or loss of the particular country to which he may belong. "Nothing is more common than to confound, and yet nothing is more important than to distinguish, that which strictly belongs to the province of law and that which properly pertains to the domain of policy. Policy might possibly suggest that which law, nevertheless, disallows; and, on the other hand, law might permit what policy, notwithstanding, would dissuade."<sup>1</sup> We are not gathered together in this room, as diplomats meet at the Hague, to compose matters of international controversy, clothed with the dignity of national representation and charged with the special and sacred care of national interests. Ours is a different and a humbler rôle. We are merely volunteers from many nations, associated in the desire to further the common good of all by contributing, through suggestion and discussion, to the improvement of the law which ought to govern the dealings of humanity in time of war as well as in time of peace.

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\* This paper was read at the Berlin Conference of the International Law Association in October, 1906.—[ED.]

1. *Letters by Historicus on International Law* (London and Cambridge, 1863), p. 3.

There is no doubt that, whereas, since the year 1856, in the case of war between any of the Powers who have acceded to the Declaration of Paris, the neutral flag has covered enemy's goods, with the exception of contraband of war, a belligerent is acting in strict accordance with international law who captures at sea and, through proceedings in a competent prize court, confiscates and sells the merchant ships of subjects of the enemy state, together with any goods belonging to such subjects as the ships may contain, and makes prisoners of their crews. The proceeding in the prize court is an inquest held upon the captured property in order to discover whether it has been lawfully captured or not. It is especially a safeguard against the violation of the rights of neutrals. But in the case of ships captured at sea, and their cargoes, if they do belong to the enemy, there is no doubt that the property in them passes directly to the state of the captors when an effectual seizure has taken place; and it is therefore legal, in certain circumstances, to destroy the prize instead of taking it into port. Such circumstances are the practical impossibility of the latter course, owing to the storminess of the weather and the unseaworthy condition of the prize; the imminent risk of recapture by the enemy; the great distance of any port to which the prize could be taken; and the inability of the captor to spare a sufficient prize crew. In such cases the destruction of the prize is held to be justifiable, on the ground of necessity; and one cannot but fear that the preciousness of her coal to the modern cruiser, the great injury to her fighting power from any serious diminution of her crew, and the growing indisposition of neutrals, which Hall notes, to admit prizes within the shelter of their waters, will tend in the future to multiply the cases in which a captor will judge that his duty compels him not to attempt to bring the captured vessel into harbor. But modern feeling is against the propriety of destroying a prize, unless very good ground can be shown for it; and Hall states<sup>2</sup> that the practice of the English and French navies has always been to bring in captured vessels in the absence of strong reasons to the contrary. I do not think that the government of any belligerent state now would instruct its naval officers, as America did at the outbreak of war with Great Britain in 1812, to "destroy all you capture, unless in some extraordinary cases that shall clearly warrant an exception."<sup>3</sup>

The right of capture and, if necessity dictates such a course, of destruction, in regard to enemy's property at sea, is subject, so far as I am aware, to few recognized qualifications. The immunity of hospital ships and their contents is in the position of a rule which

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2. *International Law*, 5th edition, p. 458.

3. Hall, *ib.*, p. 457.

governs those nations who adhere to the Hague Convention of 1899 on Maritime Warfare. I cannot doubt that this immunity will obtain universally in practice among civilized nations. The immunity of in-shore fishing boats appears to me, if one may presume to differ from the opinions of some foreign jurists, to be rather a precept of international comity than a rule of international law. Certainly it is not an absolute rule. Any obligation ceases if there is an actual user of such vessels for naval purposes, *e. g.*, as spies or transports, or reasonable grounds can be shown for an apprehension of such user. Deep-sea fishing—*la grande pêche*—has never enjoyed even conditional immunity; but of the indulgent treatment, in these days of less rigorous warfare, both of all kinds of fishing boats, whilst in use as such, and of vessels engaged in scientific discovery or in carrying cargoes of works of art or educational instruments and material (for which isolated precedents already exist), one may, I think, rest assured. And the same may be said as to the practice of granting a period of grace to such enemy merchant ships as happen to be in the port of a belligerent at the outbreak of war or arrive there within a limited period after its commencement. Humanity of conduct, as was shown in the recent Spanish-American war in regard to privateering, often anticipates law.

The capture of private property by the enemy at sea is an ancient usage. The work known as the *Consolato del Mare*, or *Costumbres Maritimas*, compiled in the earlier half of the fourteenth century, treats it as a matter of course; and that work contains the earliest collection of the general customs and practices of European states in their maritime relations. The correctness of the usage stood unchallenged until the end of the eighteenth century; and the occasional assaults upon it since then, so far as they are professedly based upon ethical principle, are based upon untenable theories, for which Rousseau appears to be ultimately responsible, that between belligerent nations, the private persons of whom those nations are composed are enemies only by accident; that they are not so as men, or even as citizens, but only as soldiers; that a state can have only other states for enemies, and not men, because no true relations can be established between things of different natures.

The unsoundness of such doctrines has been ably exposed by Hall and by Westlake, in their well-known writings upon international law.<sup>4</sup> I shall quote briefly from the latter writer:

"If no true relations can be established between states and men, it must be impossible for men not only to be enemies but also to be

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4. Hall, *International Law*, 5th edition, pp. 65-67; Westlake *International Law*, 1894, pp. 259-264.



the citizens or members of a state, and, if it is only as soldiers that men are enemies, even accidentally, every measure employed in war with reference to the civil population, including the most moderate requisitions, contributions and interferences with their liberty, must be unlawful. That legal situation would make war almost impossible. . . . War establishes between each of the states which are party to it, and the subjects of the enemy state, a relation which entitles the former to treat them as identified with their state; in other words, as enemies, so far as the necessities of war require under the limitations which are recognized as being imposed by humanity. This measure is different for combatants and for the peaceable population, as the necessities and limitations referred to are different for them; but the difference does not arise from any absence in the one case of a relation existing in the other. The men who form a state are not allowed to disclaim their part of the offenses alleged against it, . . . or, therefore, to claim that hostile action shall not be directed against their state through them in their respective measures. And this is just. Whatever is done or omitted by a state, is done or omitted by the men who are grouped in it; or, at least, the deed or omission is sanctioned by them. That must be so, because a state is not a self-acting machine."

"Whilst the power of creating corporations with limited liability may well be granted to individuals by states which can impose the conditions and exercise the control necessary to prevent injustice, ethical principle must condemn the claim that men acting in groups, not subject to regulation by a superior, can repudiate their personal responsibility and leave outsiders to seek their only satisfaction from the means with which they have chosen to clothe the group."

To separate the state from the individuals who compose it is, as Hall observes, to reduce it to an intangible abstraction. The true position appears to me to be well put in Arts. 20 and 21 of the American Instructions for the Government of Armies in the field:—

"Public war is a state of armed hostility between sovereign states or governments. It is a law and requisite of civilized existence that men live in political continuous societies, forming organized units, called states and nations, whose constituents bear, enjoy, suffer, advance, and retrograde together, in peace and in war. The citizen or native of a hostile country is, then, an enemy, as one of the constituents of the hostile state or nation, and, as such, is subjected to the hardships of the war."

It is not, however, to be concluded from the antiquity of a usage or from its defensibility in point of ethical principle, that its abolition, absolutely or conditionally, may not at some time become both proper and practicable. Unless the influence of Christianity and

the progress of civilization are now but empty phrases, the recognition of the claims of humanity upon the conduct of belligerents ought to continue to deepen and widen. There was once a time when, even amongst the most civilized peoples, the course of the successful invader was commonly marked by the devastation of the land, the destruction or confiscation of private property, and the enslavement of women and children. In the centuries which followed the downfall of the Roman Empire, the influence of a Christianized civilization began gradually to soften the asperity of warfare. The Church wielded a restraining and regulative, and generally, a pacific force; questions of international morality drew the attention of her doctors. The spirit of mediæval chivalry contributed to the elevation of a standard of honor in the conduct of war, to respect for the persons and the property of defenseless non-combatants, and to a gentler and more generous treatment of the foe who failed. In the sixteenth century came the Reformation; and the Reformation "brought with it a new fury of fighting, and the wars of religion were among the most ferocious that mankind had waged."<sup>5</sup> But the same century, towards its latter end, made compensation to humanity. It gave birth to the founder of the science of international law. To assert and to popularize, as Grotius and the great publicists since his time have done, the idea of an unwritten code regulating the reciprocal relations of independent states, illustrated and evidenced, indeed, by the conventions and the usages of nations, but resting upon ethical principle as its base, was a signal service in the cause of humanity. During the two-and-a-half centuries which have passed since Grotius taught, both statesmen and jurists, while professing to conform to international law, have, it is true, not infrequently disagreed amongst themselves as to what the rule of international law was, or as to the applicability of an acknowledged rule to a given case. In the heat of war acts have been done which no principle or precedent could be found to justify. Learned expounders of international law have sometimes failed to discern between the law as it is, and the law as in their opinion it should be, or have laid themselves fairly open to the imputation of political partisanship. Nevertheless, in the course of this same period, not only has international law been systematized, and its sphere enlarged, but, although sanctionless and devoid of legislative or judicial authority, it has acquired a great and a growing influence upon the conduct of the world. There stands behind it the formidable force of public opinion, which, in these days of swift and easy

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5. Sir H. Maine, *International Law*, p. 123.

intercommunication, can manifest itself with promptitude and effectiveness. "An offender against the obligations of international law is seriously weakened by the disapprobation he incurs."<sup>6</sup> In order to confer upon amendments of international law the strongest moral cogency, attempts, beginning with the Declaration of Paris, have been made to substitute the solemn declaration of an international congress for the inferences to be drawn from the opinion of jurists, the evidence of usage, and treaties concluded between individual states. The subject of this paper is the consideration of the proposal, as it is in substance, to amend the Declaration of Paris, by moulding it so as to include within its terms the exemption from capture (subject to the law as to contraband of war and blockade-running) of all private property at sea, and by thus procuring the assent of the United States, the one dissentient in 1856, to obtain for the Declaration, in its amended form, a place in the Code of International Law.

I do not intend—indeed, I do not think it would be becoming—to express a judgment as to the decision to which a council of the family of nations ought to come. My main purpose is to submit to this conference some suggestions and criticisms as to the reasons, *pro* and *con.*, which have been put forward either on the humanitarian or the practical side of the enquiry. But before doing so, I think it may not be uninteresting if I record briefly the history of the movement in favor of this proposal to change the existing law.

So far as I am aware, the first publicist who advocated the proposed change was the Abbé de Mably, who was a diplomatist and statesman as well as an authority on international law. I have not had an opportunity of consulting his published work, *Le droit public de l'Europe fondé sur les Traités, depuis la paix de Westphalie jusqu'à nos jours*,<sup>7</sup> written about the middle of the eighteenth century. But I have had access to a trustworthy analysis of that portion of it which deals with the matter in hand. The argument of the learned Abbé in favor of the proposed change is based, in some degree, upon humanitarian grounds, but mainly upon considerations of advantage to the great commercial nations and especially to England. The real originator, however, of the movement in favor of the change was Benjamin Franklin, twenty-five years later. The eyes of the civilized world were then drawn to the young nation of the Western Hemisphere, which was just opening the first page of its great destiny; and all that its founders said and did in matters

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6. Sir H. Maine, *International Law*, p. 221.

7. First edition, 1748.

of international interest naturally received peculiar attention. A treaty of peace between the United States and Great Britain was being negotiated. In letters to Mr. Oswald, one of the British plenipotentiaries, in 1783, and to Mr. Benjamin Vaughan in 1785, Franklin urged the policy of an agreement that, in case of future war, unarmed merchant ships on both sides should pursue their voyage unmolested. At his instance, in 1784, an article was submitted to the British commissioners embodying Franklin's views, and providing also that neither nation should issue letters of marque. Great Britain dissented. But in 1785 (the year of the death of the Abbé de Mably) Franklin, Jefferson and Adams, representing the United States, successfully negotiated a treaty, containing similar terms, with the King of Prussia, which subsisted for a few years. The official American view, thus first promulgated, has remained constant. Successive administrations since Franklin's time have given it expression in messages to Congress and in instructions to their representatives abroad, and in communications made to foreign governments. In 1856 America, through Mr. Secretary Marcy, offered to adhere to the Declaration of Paris if the signatories would include in the Declaration the immunity of enemy's private property at sea. At the Hague Conference in 1899, the American commissioners, under the presidency of Mr. White, presented the following proposition:—

"The private property of all citizens or subjects of the signatory Powers, with the exception of contraband of war, shall be exempt from capture or seizure on the high seas or elsewhere by the armed vessels of military forces of the said signatory Powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said Powers."

For reasons which it would be irrelevant to narrate here, there was no discussion or vote upon this proposition, but the Conference (the delegates of Great Britain and France not voting) passed a resolution that the whole subject should be included in the programme of a future Conference. Italy, in recent years, has shown a disposition to accede to the American view. The Marine Code of 1865 declared that the capture of mercantile vessels of a hostile nation was abolished in the case of any state which should adopt reciprocity of treatment. In 1871, Italy concluded with the United States a treaty of commerce containing the exemption, subject to the condition of reciprocity. At the Hague Conference of 1899, the Italian government, through Count Nigra, formally expressed its general support of the principle of the inviolability of private prop-

erty on the high seas in time of war. No other state, so far as I can discover, has indicated, by official pronouncement, any definite decision upon the merits of the question. In 1866, when Prussia, Austria and Italy were engaged in war, the principle of the immunity of enemy merchant ships was adopted. In the Franco-Prussian war of 1870 the existing law was acted upon, Prussia being willing, and France unwilling, to grant the immunity.

The action of the American and Italian governments is itself a clear indication that a great deal of support for the proposed change of law exists in the communities for which they speak, and there can be no doubt that a considerable body of favorable opinion has grown up elsewhere. In the eighteenth century the concurrence of the Neapolitan Abbé Galiani (writing "by command") added nothing to the weight of the opinion of the Abbé de Mably, which I have already cited. For us lawyers of to-day, the adhesion of jurists, such as Sir Henry Maine and Hall amongst my own countrymen, and Calvo, De Laveleye, and Bluntschli (to mention only a few amongst eminent foreign supporters of the change) abroad, is sufficient warrant for a serious consideration of the question. At meetings of the Institute of International Law, held at the Hague in 1875, and at Turin in 1882, resolutions in favor of the change were carried. Papers on the subject were read at the Buffalo Conference of this Association in 1899, and at the Chicago Congress of Lawyers and Jurists in 1905. But, without doubt, most important factors in the development of a public feeling against the law as it stands have been the prodigious growth of maritime commerce during the last half-century and its complex ramification throughout the world. Commerce has become an elaborate and highly sensitive organization. The dislocation or suspension of any important branch of its trade will result in consequences which will be felt over half the globe. In regard to a commodity valuable for food, or as raw material for manufacture, the capture or destruction by a belligerent of a few cargoes, or even the risk of it, may affect the price of that commodity in every market. It is not only the enemy buyer or the enemy seller or the enemy carrier who is injured. The commerce of the world, as a business man has well said, is "dependent upon the efficient operation of a vast and complicated mechanism of exchange, which now, through the telegraph, brings constantly under its silent but effective guidance the whole industrial world." To propose to destroy commerce is to propose to inflict an injury which cannot be confined to those on whom it first falls. Even the immediate and direct loss to the enemy owner of the ship or cargo captured in many cases is made good to him at the expense of a neutral through the

contract of insurance effected with underwriters in a neutral state. The indirect injury, in a war between two great maritime powers, will certainly extend to many neutrals.

And so, in more countries than one, for some time past, there has been growing up amongst business men a considerable feeling in favor of the proposed change. Nearly fifty years ago Chambers of Commerce at Manchester, at Bremen, at Marseilles, and, I believe, at Hamburg also, declared that the law as to capture of enemy's private property at sea ought to be altered. In 1871 an International Maritime Congress at Naples came to a similar conclusion. And I have the authority of Perels for the statement that a resolution to the like effect was passed in April, 1868, at a session of the Reichstag of the North German Confederation.<sup>8</sup>

Of course, in weighing opinions expressed by governments, or by jurists, or by commercial men, for or against the proposed change in international law, those with whom the decision will rest will not fail to bear in mind that this is a question upon which even an entirely honest thinker must find it hard to be really impartial. Patriotism is a source of natural bias, against which it is difficult for either statesman or jurist to guard, and from which, indeed, it is not desirable that we should be entirely free. The judgment of those who devote themselves to commerce, may, unconsciously, be influenced by special considerations, which are deserving careful attention, but which must not be confounded with zeal in the cause of humanity.

I propose, with your leave, to see, in the first place, how the matter stands in regard to this last-named matter of humanity, which is much insisted upon as affording strong reason for the proposed change.

The right of war is, I suppose, as Vattel and Tetens and Azuni have said, the law of necessity, to which everything yields, and which is founded on the irresistible propensity of men to provide for their self-preservation. It is the law which commands the belligerent to deprive his enemy of every means of becoming stronger or more capable of attack, to weaken him by every possible mode, to prevent the augmentation of his forces and the prolongation of war, and to compel him to sue for peace. This involves the doing of acts which,

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8. *Manuel de droit Maritime International* traduit de l'Allemand par L. Arendt, Paris, 1884.

Anyone who wishes to appreciate mercantile views upon this question, which I have briefly indicated, would do well to read two treatises, composed by a very competent English exponent of these views, Mr. J. T. Danson. They are entitled respectively *Our Commerce in War* and *Our Next War*, and were published in London in 1894 and 1897.

viewed abstractly and apart from all other relations, are acts of evil-doing. But, as necessity is the justification for war itself, so the acts done in the conduct of war must be at least reasonably necessary for the attainment of the objects of war. The loss and suffering caused must not be disproportionately great as compared with the resulting advantage. "The general principle is that in the mode of carrying on war no greater harm shall be done to the enemy than necessity requires for the purpose of bringing him to terms. This principle excludes gratuitous barbarities, and every description of cruelty and insult that serve only to exasperate the sufferings or to increase the hatred of the enemy without weakening his strength or tending to secure his submission."<sup>9</sup> The necessity, according to Tetens, may be judged of by the criterion, that the means employed to produce the effect be in proportion to the end for which they are employed. To obtain the object to be effectuated, we must not do more mischief than what is unavoidable in order to obtain it. This is a universal rule, applicable not only to the plan of operations against the enemy, but also to each single operation.<sup>10</sup> Whilst, however, in principle, necessity in war is omnipotent, and war is essentially inhuman, there is a degree of inhumanity in certain acts which is so intolerable that the usage of civilized nations, now crystallized, and imbedded in international law by the Hague Convention of 1899, has placed them as acts of land warfare in a catalogue of absolute prohibition. Other acts of land warfare, in the interest also of humanity, are, by the same convention, regulated and limited by conditions; and a third class of acts is held to be justified only if demanded imperatively by the necessities of war. In the first category are included (*inter alia*) the use of poison or poisoned arms, the massacre of prisoners, treacherous assassination, the attack or bombardment of towns, villages and habitations which are not defended, and pillage; in the second class are requisitions and demand of services, and the use of the enemy's railway plant, land telegraphs, telephones, etc., and all kinds of war material, even though those things are private property; in the third, the seizure or destruction of enemy's property. Now we are considering maritime warfare. How ought that to be conducted? No one, so far as I have heard or read, suggests that the capture of the enemy's merchant ships and their cargoes should be absolutely prohibited. We cannot suppose that any maritime state will allow vessels available as transports to assemble unmolested for the invasion of her

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9. Sir Henry Maine, *International Law*, p. 138.

10. See Reddie, *Maritime International Law*, vol. ii, p. 143.

shores or to cruise unmolested as spies. No one has proposed that enemy's vessels should enjoy immunity if carrying contraband of war or running a blockade. The question put is this: Is it reasonable that the right of capture should be generally forbidden, and held justifiable only upon proof of some special necessity?

I am not, as I have already said, presuming in this paper to offer a judgment of my own on the case. I am simply desirous of drawing attention to those points which appear to deserve consideration.

Let us look first at the case as it is put forward on the humanitarian side. There is no doubt that the capture or destruction of enemy's merchant ships and enemy's cargo laden thereon, like most other active operations of warfare, involves personal suffering and loss to some non-combatants. The crew of the captured vessel become prisoners of war for the time, and the existence of the system of capture by causing a total or partial suspension of sea traffic takes away the means of livelihood from a large number of those who pursue avocations directly or indirectly dependent upon the continuance of the carriage of goods by sea. Nor is this hardship entirely confined to the subjects of one, or, if the belligerents are fairly matched in sea power, of both of the warring states. Similar classes of workmen in the neutral ports to which in time of peace the shipments from the belligerent nations used to go will be injuriously affected, although, to some extent, their loss may be mitigated by the continuance in neutral bottoms of the trade formerly carried on by ships of the belligerents. In the second place, there is also, of course, a loss to the wealthier classes of both the belligerent countries, who own the ships and the goods which are captured. There is the direct loss for which they may and generally would be indemnified by the underwriters. There is also the indirect loss, owing to a general interference with business, and also to the rise of freights and of insurance premiums which might, possibly, in time, result in a permanent transfer both of the carrying trade and of branches of mercantile business to neutral competitors. And, further, as I have pointed out in an earlier part of this paper, the sea-borne trade of one or both of two great commercial countries could not, in these days, be crippled or suspended by the operations of war without serious injury resulting to neutrals also in many parts of the world. All this mischief to mercantile interests (whether as affecting the belligerents or neutrals) is obviously a very important matter in itself. But I am by no means sure that it can, in strictness, be treated as a point in the humanitarian case. Something may be held to depend upon its ulti-



mate incidence, and this is a question for the political economist on whose realm I do not venture to intrude.

There is yet another argument to be mentioned, and it is one which is properly an argument of humanity. It is urged by some of those who favor the proposed change that the existing rule gives encouragement to attacks upon defenseless merchant vessels in order to obtain prize money, and thus tends to keep alive an ancient and discreditable notion that war may be waged by honorable men for their own private gain. But, in my humble judgment, the plea has, in these days, lost all practical weight. The danger referred to vanished (for America, since the war with Spain, may be treated as assenting to the Declaration of Paris) with privateering in 1856. If I rightly appreciate naval opinion, patriotic prudence, if nothing else, would now prevent the naval officers of a great Power from entertaining any temptations to chase merchant ships merely for the sake of private lucre. Such a proceeding, to use the words of a high authority,<sup>11</sup> is one "in which effect is frittered away in the feeble dissemination of the *guerre de course*, instead of being concentrated in a great combination to control the sea."

After reading and considering a great deal that has been spoken and written upon this subject of capture of enemy's private property at sea, I cannot help thinking that the force of the very considerable agitation, which has gradually grown up in favor of alteration, is largely, if not mostly, due to a moral sentiment—a feeling that to maintain a right, in general, to capture, and, if the circumstances, from the naval point of view, require, to destroy private property at sea, is to fall short of the moral standard of modern civilization in the conduct of warfare. Such a feeling is one of a noble sort. Emotional energy has helped in the past, and will help in the future, to do a great deal for the happiness of mankind. But to be truly useful, and not to do harm, it ought always to be guided by an accurate knowledge of facts, and by a just appreciation of the relation of facts to each other. I venture to suggest that, so far as the appeal for change is based upon a comparison of the treatment of private property in war on land and the treatment of private property in war upon the seas, the language and the reasoning, in not a few cases, of those who have made the appeal, are open to serious criticism. Private property is said to be respected in land warfare; and then it is asked, sometimes almost indignantly, and with much flourish of rhetoric, "Why is private property not respected in maritime warfare?" The capture of private property at sea has been

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11. Mahan, *The Interest of America as a Sea Power*, p. 133.

denounced as if it was identical in character with the military pillage which is not one of the ways of modern warfare and which is absolutely prohibited by the express terms of the Hague Convention.

Now, there are three points as to which I wish to invite your attention in questioning the strength of this line of advocacy.

I.—First, there underlies the whole position an assumption that the degree of necessity which exists in maritime warfare for the capture of private property of the enemy is no greater than, or different from, the degree of necessity for the capture of private property in land warfare, it being granted, of course, that, in both cases alike, the test of justification of the conduct of war (not being the perpetration of any of the absolutely prohibited acts) is its reasonable necessity in order to achieve the end of war, that is to say, success.

Is this assumption sound? Are not the conditions of the two cases so different as to prevent there being any real analogy between the two operations? May it not be said with force that the private property on land which is exempt is private property the taking of which, in general, and excluding the special classes of private property which are within Art. 53 of the Hague Convention, could not reasonably be expected to affect the issue of war; whereas, at sea, the ships and the merchandise in transit on board of them, although privately owned, may not infrequently form no small portion of the national resources upon which the enemy must rely in order to persist in his resistance? I shall not offer an answer to these questions. But I may add in regard to enemy's ships that these questions do not lose in importance by reason of the fact that a daily increasing proportion of the vessels which are now used in commerce consists of large and swift steamers, readily available as transports and for the rapid acquisition and transmission of information of the enemy's movements and operations, or convertible into armed cruisers; whilst their crews in the engine-room and stoke-hole constitute valuable, because trained, recruits for the personnel of the modern warship. Russia, as far back as 1878, founded a "Volunteer" fleet, and Great Britain in 1887, and America in 1892, entered into special arrangements with certain steamship companies for the right of employment of steamers of these companies in government service.

II.—The second point in the appeal to which I desire to call attention is the fundamental statement that private property is respected in land warfare. Does not this allegation make far too much of the rule and far too little of the actual practice? Not fifty years ago a great general marched through Georgia and Carolina, devastating the hostile country as he went for reasons of military necessity. Would any commander in the field, in the enemy's coun-

try, hesitate—ought he, indeed, to hesitate—to demolish château or cottage or factory, or to cut down private woods or standing crops, if he judged it to be strategically necessary to do so in order to secure his own position in battle, or to weaken his opponent's? *Kriegsraison geht vor Kriegsrecht*. In the course of the same American War as that in which General Sherman made his celebrated march, the Federal troops seized, wherever they could find it, the privately-owned cotton, which constituted an important part of the resources of the Confederates. And in regard to such seizure, the Supreme Court of the United States has decided that it was lawful.<sup>12</sup>

III.—The third and last point is the comparison of capture of enemy's property at sea to the pillage which the Hague Convention has absolutely prohibited. I am, I confess, wholly at a loss to understand such a comparison. What pillage was in olden times we all know well—the licensed indiscriminate plunder of terrified and helpless families by an excited soldiery. What possible resemblance is there to this in the orderly and formal capture of a merchant ship by a man-of-war, and the orderly and formal condemnation of that ship and its cargo, if it be lawful prize, by a Court of Justice? The distinguished lawyer and statesman who at present holds the highest legal office in my country, but who was then Sir Robert Reid, wrote, in October last, a weighty letter to the *Times*, suggesting the favorable consideration of the proposed change, in the interest of Great Britain. But, in the course of that letter he remarked, and, as I respectfully maintain, with absolute truth: "No operation of war inflicts less suffering than the capture of unarmed vessels at sea."

I shall not, I hope, be deemed prolix if I add upon this point two quotations, one from an English and one from an American authority. Mr. Lawrence, who has held the post of Professor of International Law both in an English and in an American University, has put the case, as it seems to me, with great clearness:—<sup>13</sup>

"In fact, the superior humanity of land warfare exists more in name than in reality. Private property may still be captured at sea; on land it is exempt from seizure. There is a sharp contrast in the rules so far as words are concerned. But, if we leave expressions and deal with facts, we shall find that a country may be swept bare of supplies to feed the soldiers who hold it down by hostile force. Peasants may be impressed to drive their own carts for the invaders. The produce of the farmer, the stock of the trader, the stores of the

12. See, as to this, *Wheaton*, 4th English edition, p. 483.

13. *The Principles of International Law*, pp. 362, 363.

merchant, may go to fill the magazines of the enemy; and the slightest attempt on the part of the population to aid their fatherland by active means may expose them to all the horrors of military execution. It is true that the individual soldier is not allowed to plunder at his pleasure, but neither is the individual sailor. The capture of a merchantman is as regular and orderly a proceeding as the levy of a requisition upon a country town. In both cases private property is taken, but taken by disciplined agents of the enemy state acting under public authority. If there be any moral superiority, it is on the side of the maritime transaction; for a boat's crew engaged in the search and capture of a trading vessel can be kept under more complete supervision than a foraging party engaged in taking grain and stock from a country village; and, moreover, the presence of women and children in the one case, and their absence in the other, suggest considerations which certainly do not favor the claim of superior humanity made on behalf of land warfare."

Hall makes a similar statement,<sup>14</sup> and at its close quotes this language from Dana:—"Maritime capture takes no lives, sheds no blood, imperils no households, and deals only with the persons and property voluntarily embarked in the chances of war for the purposes of gain and with the protection of insurance."

I desire, before quitting the region of humanitarian argument, to call attention to the fact that there are those who oppose the immunity of private property on the very ground of humanity itself. What, they ask, is the ultimate object for which good and humane men should work? Surely, the cause of peace. Is it quite certain that, in respect of the interests of peace, war at sea may not be made too cheap, that the amount and area of economical loss by war may be too narrowly limited and so a powerful influence in restraint of war may be destroyed or seriously impaired? If you render maritime trade immune, you remove one of the worst terrors of war from the wealthier classes, the classes which, in some countries at any rate, are the chief directors of the national policy. Will a power be less likely to go to war if it no longer has either to defend its maritime commerce or to transfer it to a neutral flag? Sir Thomas Barclay adverted to this point in a paper read by him at the Buffalo Conference of this Association in 1899; it was the principal topic of an eloquent speech of Mr. Moorfield Storey, of Massachusetts, a delegate of the United States government, when addressing the St. Louis Congress of Lawyers and Jurists in 1905, upon a resolution which had been proposed in favor of the exemption from capture of private property at sea.

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14. *International Law*, pp. 446-447.

I quote his concluding words: "I want to oppose war by everything that can be done. I do not want the citizens of a great country to feel that they can go out among the farmers of the country and say 'give us your sons, but our pockets are to be exempt from contribution.' If we are to have war, let it fall on the material resources of the country. You cannot bring people to peace as quickly by killing as you can by destroying their resources, and for that reason I am not inclined to pass this resolution. It tends to induce war to a gladiatorial show, like a football game, instead of making every man in the nation feel the effect of it."

Sir Henry Maine appreciates the argument, though, upon the whole, he does not deem it convincing. Writing upon the Declaration of Paris, he says:<sup>15</sup> "It may be asked whether it would tend to diminish wars if economical loss were reduced to the lowest point, and if hostility between nations resolved itself into a battle of armed champions, of ironclads and trained armies, if war were to be something like the contest between the Italian States in the Middle Ages, conducted by free companies in the pay of this or that community. I think that even thus modified, war would be greatly abated. But this is a subject which ought not to be taken for granted without discussion."

When we pass from the consideration of the present question on the humanitarian side, and approach its practical side, we enter a region in which the only trustworthy guides are the statesman and the naval expert. The opinion of a layman, like myself, would be worth nothing, and, even if I were bold enough to form a judgment, I should not deem such an occasion as this a fitting one for its delivery. The matter is one which would necessarily involve the consideration of the interests of particular nations; and that, as I stated at the outset, it is my set purpose to avoid. This much, however, I may say. The determination of those who will have, in a representative capacity, to discuss the question must depend in large measure upon the counsel which, in the interest of their respective countries, competent advisers may give, first, as to the value, in the present and in the future, of commerce-destroying for success in war, as to which there is evidently a wide difference of opinion (Mahan, for example, affirming that "blows against commerce are the most deadly that can be struck,"<sup>16</sup> and others maintaining an exactly opposite opinion<sup>17</sup>); and, secondly, as to the comparative advantage, on

15. *International Law*, p. 123.

16. *The Interest of America as a Sea Power*, p. 133.

17. See Lawrence, *Principles of Maritime International Law*, pp. 415, 416.

In November, 1856, Lord Palmerston, in an address to the Liverpool Chamber of Commerce, expressed the opinion: "If we look at the example of former periods, we shall not find that any powerful country was ever vanquished through the losses of individuals."

the other hand, which may result, under a change of practice, from the security during a war, of the continuance of a sea-borne supply of food and of the various materials upon which manufacturing industry is dependent.

I shall now bring this paper, which has already extended to a greater length than I should have desired, to a close with a few suggestions.

The first of these is that with the consideration by the nations of this question of the immunity of enemy's property at sea from capture in war should be linked the consideration of the subject of contraband of war. It has been truly said that, as long as it remains in its present chaotic condition, we must have constant bickering between belligerents and neutrals, and that if a great maritime war broke out powerful commercial states might find themselves drawn into hostilities almost against their will. The dangerous, and, to neutrals, very troublesome uncertainty that exists at present in regard to the treatment of articles which are *incipit* (or, *promissus*) *usus*, ought to be remedied. It can be satisfactorily remedied only by an international agreement, classifying contraband definitely and completely. An interesting illustration of the unsatisfactory nature of the position of the matter of contraband is afforded by the Parliamentary paper of February last, which contains the correspondence between the governments of England and Russia in reference to the Russo-Japanese war. The relevancy of the question of contraband to the subject of our enquiry is this. It appears to me that, if the arbitrary decision of any belligerent (as is at present the case) may include every important article of commerce, such as provisions, trade materials, fuel, etc., in the list of contraband, little can be gained by a general exemption of private property from capture at sea. It appears to me, also, that it conceivably might make a great difference in the view which some nations would be willing to adopt in regard to the proposed change, if it were definitely settled law that some, at any rate, of the principal articles of sea-borne commerce, and, especially, food for human consumption and the raw materials required by peaceful industries, could never lawfully be treated as contraband of war unless the captor could show that the particular cargo was destined for use for naval or military purposes of the enemy either in the region of actual operations or elsewhere.

And, further, with the question of the exemption of enemy's private property from capture at sea, should there not be considered the propriety of a definite pronouncement that the bombardment by naval forces of defenseless and unfortified towns and places on the sea coast, or the threat of such bombardment in order to secure the

levy of contributions or compliance with requisitions should be forbidden? Some jurists, I believe, hold that by the tacit consent of nations, such conduct has already come into the category of forbidden operations. I cannot see sufficient justification for the view. In 1882 a distinguished French Admiral, writing on his own behalf, of course, and not officially, published the opinion that "armored fleets in possession of the sea will turn the powers of attack and destruction against the coast towns of the enemy, irrespectively of whether these are fortified or not, or whether they are commercial or military, and lay them in ruins or, at the very least, will hold them mercilessly to ransom;" and the writer was subsequently appointed Minister of Marine. Mahan evidently considers such a proceeding as not being prohibited by usage, for in the course of his argument in support of the existing system of capture of enemy merchant ships he says:<sup>18</sup> "Nor is there any among the proposed uses of a navy, *as, for instance, the bombardment of seaport towns*, which is not at once more cruel and less scientific." It is highly desirable that the matter should be finally concluded by common agreement. The settlement of this question, as well as the classification of contraband, might do something, at any rate, to influence favorably some of the maritime powers in their consideration of the immunity of private property at sea, as a question of policy.

Lastly, I venture to add that, although agreement as to a general immunity of private property of the enemy at sea may prove to be impossible, the collected representatives of the various members of the family of nations might be asked to consider whether some modification of the present system might not advantageously be adopted in the form of a particular exemption in favor of the vessels of the great steamship lines which carry mails and passengers everywhere along established routes, and upon whose continued regularity of service the intercourse and intercommunication of large portions of the globe are absolutely dependent. Effective guarantees must, of course, be taken against abuse of such a peculiar freedom, but it ought not to be impossible to frame such guarantees. It cannot be doubted that the arrangement would confer a very great boon upon mankind. I have found in a note in the French translation<sup>19</sup> of the work of Perels a precedent, on a small scale, for such a course as I have ventured to suggest for universal international agreement, in the postal treaty, which Perels there cites, concluded between Great Britain and Denmark in June, 1846.

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18. *The Interest of America as a Sea Power*, p. 163.

19. Arendt's Translation, p. 236.

With these suggestions I conclude a paper, which has run to a far greater length than I had hoped and intended, but which, nevertheless, leaves much unsaid upon a great subject of practical importance. I have not written in order to express an opinion for or against the change; I have simply tried, clearly and fairly, to lay before the Conference the most important points, as they seem to me, to be considered before the proposed change can be accepted, with a brief statement of the history of the question and of the principles which, as I venture to think, must govern its solution.

*Hon. Sir William R. Kennedy, LL.D.\**

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## THE COMPROMISE IN THE JAPANESE CONTROVERSY.

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But a few weeks ago there were those in Congress and out of Congress who saw in the Japanese protest against the exclusion of Japanese children from the public schools of San Francisco a sure indication that Japan was desirous of provoking war with the United States. Men like Senator Perkins and Richmond P. Hobson saw in the protest an ultimatum and that our only choice was surrender or fight. To their minds the school question was merely a pretext for bringing on a war in order that they might seize the Philippines and Hawaii.

If their conclusion, that what Japan really wanted was a war with the United States, was correct, the situation was indeed a serious one, for Japan could seize those possessions and fortify them before the United States could offer any very serious resistance. Once in possession and fortified, Japan could act upon the defensive and the United States could take its choice between assuming the very difficult and expensive task of dislodging them or abandoning to them its possessions in the Pacific. It would no doubt choose the former, and, because of its stronger financial condition and vastly greater resources, would be reasonably sure to win in an endurance contest. But the cost would be tremendous.

It is therefore fortunate for the United States, for Japan and for civilization that those prophets of evil were incorrect in their hasty conclusion that Japan wanted war with the United States. The fact is that war with the United States is just what Japan does not want. The friendship of the United States has been and is to Japan a much more valuable asset than the Philippines and Hawaii. It is therefore unreasonable to suppose that she would sacrifice the former for a mere prospect of possessing the latter, with the likelihood of financial ruin which an attempt to possess them in this way would entail, even if successful. When, therefore, we consider that, even when viewed from the most favorable standpoint, the prospect is decidedly unpromising, it would be little short of madness for Japan to assume the risks of war. Hitherto Japan has pursued a wise and conser-

vative foreign policy and there is little basis for the conclusion that she has now made up her mind to run amuck.

Now that Japan has in Korea and Manchuria an outlet for her surplus population and energy, there is every reason to believe that she will devote her energies to development in that direction rather than provoke a war which would lose to her the fruits of her victory over Russia. A few years ago her necessity for an outlet was such as to justify the taking of great chances in order to secure it, but this outlet she now has. The need of a field in which to expand has been satisfied for the present and it will be several years before it will again become pressing.

But can the Japanese protest be explained upon any other ground than that of a desire to provoke war with the United States? Had she any real grievance? Article I of the treaty of 1894 between Japan and the United States reads as follows:

"The citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their persons and property. . . . In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind; to the succession of personal estate by will or otherwise, and the disposal of property of any sort and in any manner whatsoever which they may lawfully acquire, the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects, or citizens or subjects of the most favored nation."

It is true that this does not in express terms grant to Japanese children the right to attend the same public schools as white children. In fact it does not in express terms grant to them the right to attend any public schools. But the rule of interpretation applied to treaties is different from that applied to criminal statutes. For while the latter are interpreted according to the rule of strict construction, treaties are interpreted liberally. By conceding to them the right to attend the public schools for Orientals we admit that we do not intend to apply the rule of strict construction.

Nor, indeed, would it be consistent or lawful to apply one rule in interpreting treaties with Japan and a more liberal rule in construing treaties with other nations. The very purpose of the most favored nation clause is to prevent discrimination of this sort as well as of any other sort. As we would not while this treaty is in force have a lawful right to grant by express terms a right to better treat-

ment than is accorded to Japan with reference to matters covered in the treaty, so we cannot lawfully accord them better treatment by applying a different rule of construction to treaties with them containing the same terms. In other words we cannot do by indirection what we cannot do directly. If we could, the most favored nation clause amounts to nothing.

In our treatment of European nations we have in our treaties with them construed rights of residence to mean the right to send their children to the same public schools as the children of American citizens attend. Whether this is wise or not may be open to question. But there can be no question that we have considered the right to send their children to the public schools as incident to the right of residence. Such being the construction adopted and acted upon during more than a century, we are not now at liberty to adopt a different rule of construction with reference to Japan, particularly while we adhere to the old rule with reference to other nations.

But it is urged that the Japanese are of a different race and that therefore it is unwise to allow their children to attend the same school as white children. Whether or not it is advisable to allow children of different races to attend the same schools is, perhaps, an open question. Arguments against it could therefore have been legitimately urged when the treaty was being negotiated or before the Senate when the treaty was awaiting ratification. But it certainly does not have the appearance of candor or fairness to urge them as a sufficient excuse for breaking our faith with a nation with whom we have contracted in the most solemn form. Contracts are not something to be thus lightly set aside simply because someone sees what he conceives to be a new light.

It may be that the ethnic argument furnishes a sufficient reason for modifying the existing contract. But the proper body to judge of this is not the legislature of California, but a joint conference of the representatives of Japan and the United States. If to such a body the facts appear to warrant a modification, there is then no legal objection to making such a modification or modifications as in their judgment seem necessary. But, clearly, one party and a *fortiori* one not a party to a contract, is not the sole judge of what modifications shall be made in that contract.

But it is insisted by some that so far as concerns the rights of Japanese to attend the public schools of California no contract exists, because the United States has no power to make a contract affecting this subject. This raises the question of the extent of the treaty-making power of the Federal government.

The Constitution of the United States vests in the President and Senate the treaty-making power, without limitation. As it nowhere defines what is meant by the term "power to make treaties" it is fair to suppose that the framers of the Constitution had in mind the treaty-making power as it then existed in England. If this supposition is correct, there can be no doubt as to the power of the Federal Government to make the treaty in question. If legal, it is "the supreme law of the land," and the act of the legislature of California interfering with its fulfillment is unconstitutional.

But even if this supposition is incorrect, and the framers of the Constitution did not intend to confer upon the Federal Government the power to make treaties to the same extent as was possessed by the British Government, certain it is that it has from the beginning of its existence been exercising the right to make treaties containing the most favored nation clause, nor has its right been questioned. It was, therefore, entirely natural that Japan should conclude that the Federal Government was not exceeding its powers by inserting the most favored nation clause in this treaty. While each nation is supposed to know the constitutional powers of the branch of the Government with which it is dealing, was not Japan amply warranted in concluding from this long acquiescence in the exercise of the power that we would not seek to escape our obligations to her by denying the power of the Federal Government to make treaties containing so common a provision as the most favored nation clause?

The question of the power of the Federal Government to make treaties containing the most favored nation clause will have to be answered by the Supreme Court of the United States. The existence of the power is too vital to the conduct of our foreign relations to remain unanswered. It is therefore unfortunate that the compromise will probably result in the present case being dropped instead of being carried to the Supreme Court for decision.

If the Federal Government has the power to make such treaties, it follows that it has the power to enforce them, even though certain of their provisions may be objectionable to some section of the country. Any other view would be tantamount to holding that unanimous consent of all sections of the country to the provisions of a treaty is necessary in order that a treaty may be enforceable. This could never have been the intention of the framers of the Constitution. The weakness of the government under the Articles of Confederation in the conduct of foreign relations was one of the strong incentives toward the formation of a new Constitution, and it is unreasonable to suppose that the framers of that instrument did

not intend to confer such power upon the new government as would remedy what was admittedly a defect in the old government.

In order to avoid forcing the issue, California has agreed to admit the Japanese children into the public schools on condition that Japanese coolies not already here shall be excluded from this country. This satisfies the labor organizations, and it was they who were responsible for the act excluding Japanese children from the public schools. It also satisfies Japan, as the amendment to our immigration laws will be general in terms and hence will not wound the pride of the Japanese and will have the effect of turning the Japanese laborers toward Korea and Manchuria where their labor will contribute far more to the progress of Japan than if they emigrated to the United States.

While, therefore, the settlement reached accords very well with the economic interests of Japan and with the political exigencies of both countries, it leaves the main question raised in the controversy precisely where it found it. It leaves room for the suspicion that the school question was raised by the labor leaders in order to furnish a *quid pro quo* in negotiations looking to another end, viz., the reduction of competition by Japanese laborers in the California labor market. It merely postpones the settlement of the legal question of the extent of the treaty-making power of the Federal Government—a question of far more importance than the presence or absence of a few Japanese laborers in any section of our country.

*Edwin Macey.\**

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\* Prof. Macey was retained as counsel by the Japanese Government during the recent controversy.—[ED.]

## HOW TO GET LAW PRACTICE.

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First, get the best education. To educate is not to cram memory with facts, but to draw out powers of mind. No amount of information picked up in an office, compares with systematic training in a modern law school. One great American lawyer fitted himself for legal study by reading Shakespeare, the Bible and Bunyan's "Pilgrim's Progress." Young men who were denied collegiate or even academic discipline have made their way into law by simple mastery of the English tongue. Again one ought to study law for love of it, or not at all. If he has no love for it he does well to leave it. A friend applied to me for advice as to how to enter the legal profession. I suggested to him not to go into it but to follow up electricity in which he was employed. To my surprise he answered: "I know there is more money for me in electrical science, but I do not like it and do like the law."

The Connecticut rules require that an applicant for examination must satisfy the committee that "before beginning the study of the law, he graduated from a college, high school or preparatory school whose standing shall be approved by the committee, or was admitted to some college or law school, the requirements for the admission to which shall be approved by the committee, or passed an examination upon his literary qualifications before them." If one would learn how to get law practice, let him conform fully to this wise rule.

Many have asked me how to get into an office, and start in practice. Some years ago it was said that "the way to resume specie payments is to resume" and I add that the way to start in law practice is to start. Take an office, put out a shingle and go ahead. If clients do not come, study law and watch practice in the courts. The late William Hungerford of Hartford, a wonderful example of success in legal work once gave hints to me. In his quaint way he said: "I do not quite see why anybody wishes to be a lawyer, but if you really do, I advise you to hire the best office in the city, to buy all the law books you can pay for, and then buy all law books you can get trusted for." The Yankee shrewdness in that advice needs no comment. Yet how many disregard it, and we see them in small and dingy offices with few authorities, not even the rules of court at hand, and with no opinions of their own in which they have confi-

dence. What should we think of a carpenter who has not a hammer or gimlet, and who must go to a neighbor to borrow a jack plane, and what wonder if clients say of the lawyer without books, that he probably does not know his business? Does a good library advertise a lawyer? A client came into an office and made inquiries as to a deed of land to be recorded in Germany. He was told to send to Germany for his deed, and that when brought here it could be executed before proper authority. Then he stood and surveyed the office a long time, and finally said: "Well, sir, you ought to know something about it, because you have books enough."

A member of the bar asks how he can advertise. He cannot advertise as a grocer praises a new brand of flour, or the marketman his provisions, but there are other methods. It is right and professional to get a case put fairly before the public. Perhaps we ignore press reporters too much. A fair report of your case, giving full credit to your opponent, whether you win or lose is one of the best methods. The very fact that the counsel tried the case makes him known to the people. We are never to forget that the case we lose may give us quite as much good standing as the one we gain. Public attention has lately been fixed upon a great heresy trial. The distinguished counsel for Dr. Crapsey was widely known before, but who can doubt that this case which he lost, has advertised him an hundred-fold. The truth is, the public wish to know what the case was, the questions and amount involved, no matter which counsel prevailed in it. A member of the bar went out to a country place and was introduced to a famous banker who at once said to him: "I seem to know all about you, having read your cases in the papers for twenty years." Is it too much trouble, then, to put in type a fair statement of the case containing those points which interest the public, the names of opponents as well as our own, and give it to a reporter as an item of news?

To have clear opinions upon legal points, and to stand up stoutly for them is a great thing. Perhaps the first inclination of a timid practitioner is to leave his office and seek advice. Why not exhaust every source of information before consulting any senior counsel? Clients certainly put confidence in the man who has faith in himself and in his cause. Especially they like a man who does not fear to take the unpopular side. Salmon P. Chase made an eloquent argument in favor of a woman, a fugitive slave, and a bystander remarked: "that fine young fellow has just ruined himself;" but he rose to be chief justice of our highest tribunal.

When the poor and defenseless appeal to one of us, they invoke the chivalry and valor of the profession. If a young man wants to

get law practice let him take up the cause of those who are weak, poor and cannot defend themselves. This is not to advocate taking cases on mere speculation, or making a bargain for a share in the controversy. There are cases where counsel are justified in going to great lengths in order to prepare and try the cause of a poor man. We never can tell what turn a case will take in a critical moment. A train was thrown off by a misplaced switch, and the engineer killed. One company owned the train, another controlled the track and switches. Was this a case of fellow servant, or was either company liable? After a long search, a young attorney found the case of *Farwell v. Boston & Worcester R. R. Co.*, 4 Metcalf 48-61, and the opinion of Chief Justice Shaw, who put that very case by way of illustration, and held that the company owning the track would probably be liable. By this authority a handsome settlement was secured and when the check was handed over, the president informed the attorney that he would never have obtained it, if he had not looked up that opinion of Chief Justice Shaw.

Another question of great interest to the practitioner is whether he shall run for office. Now that depends. If he can get an office which is in the line of his profession and will introduce him to business, of course it is well to take it. But with profound respect to every legal brother, is it not wise to avoid frequent attempts to get some position or place? The best office for a lawyer is his own office, and the best "place" for him is the one where he does hard work. Office-seekers in our craft are often those who dislike this, and shrink from the effort required to master a difficult proposition. They want some easy place with good compensation. It is better to take no place incompatible with the best legal service. A student who afterward became chief justice of the Supreme Court of the United States, applied to a senator for a position under the government. The reply was: "I would give you a half dollar to buy a spade, for then you might come to something, but once settle a young man down in a government position, he never does anything more—it is the last of him." But how does the average youth stand as contrasted with those who have law business ready made for them? There are such lawyers. Fine offices are fitted up for them; libraries are furnished them; receiverships, positions as corporation counsel, executor, administrator or trustee, and retainers from the best business houses are provided for them. They build up nothing, but inherit everything. They are not perplexed with the difficult question where to go:—parents or friends settle that for them. But what is all that to most of us? If a boy is to be born to good luck, does it make any difference whether he inherits a line of



business or a million dollars? Really he knows nothing about the struggle of life. Charles O'Connor wanted law books and could not buy them. He saw an offer of a lot, at two dollars per volume. He could not raise the money, but finally induced a business man to endorse his note and got the books. After he had become the most famous lawyer in New York, he was able to load with favors the family of that benefactor who assisted him to what he thought a fortune—one hundred and fifty-six law books.

Then there is the question where to locate, so very hard to one who has no foothold in cities or business centers. A distinguished jurist once gave me points upon this subject. He said that a young lawyer without a location, ought to start in a country town, try small cases, learn everything about details of practice, but be sure not to spend his life there. Having mastered practice, go to a large city, no matter if as large as London. No doubt it is difficult even after much experience, to get a start in a large city, but the advantages are so great that lawyers will do well to consider this advice which came from the late Joel Hinman, chief justice of the Supreme Court of Connecticut. An excellent plan is to begin near a large city, stay long enough to become well acquainted, then move into the city. In that way the country lawyer gets hold of clients, and they will follow him to the city, where they go for business. Many successful attorneys have this firm support from a country clientage, and it helps them greatly.

Mere oratory will not advance a man to the front rank in our profession. Indeed oratory has gone out of fashion, and the stately and pompous speeches of a former generation would hardly be tolerated in this age of business. The trial of a cause is no longer a show for spectators, but a field for quiet and good work. Lord Erskine's remark that: "No man can be a great advocate who is no lawyer" is true now as when that wonderful sailor and midshipman got into the bar and astonished the people of England by his brilliant defense of Captain Baillie. Lord Campbell makes the following comment upon Thurlow:—"Let me then anxiously caution the student against being misled by the delusive hope which the supposed idleness of Thurlow has engendered—that a man may become a great lawyer, and rise with credit to the highest offices, without application. Thurlow would never have been chancellor if he had not studied his profession; and he would have been a much greater chancellor, and would have left a much higher name to posterity if he had studied it more steadily." The same writer says of Lord Camden that when he was Charles Pratt and ten years old, he had the misfortune to lose his father, Sir John Pratt who had become

chief justice of the Court of King's Bench. But the biographer adds that this was the remote cause of his future eminence. "While he was studying law and young at the bar, the run of the house of the chief justice of England, with the chances of sinecure appointments would have been very agreeable, but would probably have left him in the obscure herd to which the sons of chancellors and chief justices have usually belonged." It is well known that Camden's practice was so limited and he became so much discouraged that he thought of leaving the bar for the church, but in 1752 William Owen, a bookseller, was prosecuted for a libel upon the House of Commons, and the poor lawyer, but future chancellor, was retained for the defense and made his mark and fortune.

Certain minor questions are often asked. A young lawyer will inquire whether he shall go into society, make acquaintance, or join secret societies for that purpose. Of course to get acquainted with business men is highly desirable, but mere society is poor diet for any earnest man. One member of the profession told me that he should be glad to join certain societies for business, but that it would be very distasteful to him. Perhaps a legal and classical education tends somewhat to isolate us from the community. The fact is, most of us must plod along, for we cannot fly, as was said of Matt. Carpenter: "He had a way of saying things that was peculiarly his own, without affecting or seeming to be peculiar. He talked about the points involved in a case and discussed grave and weighty questions of law almost as a bird sings." We may never sing or soar in regions of the law, and it is a comfort to read of Mr. Carpenter that throughout his life "he was a marvel of industry, and has not left behind him a more diligent and devoted student in the profession."

There are other things to study than law. Are men so busy making money that they have no time for mental discipline? Rufus Choate tells us that he took a few minutes each day with favorite authors, English, Greek, Latin, and French. He adds: "It has been said there never was a great character, never a truly strong masculine commanding character, which was not made so by successive struggles with great difficulties. Such is the general rule of the moral world, undoubtedly all history, all biography verify and illustrate it."

Has a lawyer any fondness for mathematics or foreign languages, why should he not keep up his studies in them, and thus keep his mind bright? Will he do less in office or court for having read a few pages in Homer or Xenophon, Virgil or Tacitus, or for having worked out problems in algebra or geometry?

Little is said about wit as an aid in obtaining law practice, because so few men have it. Wit is really quick sight, a rare and wonderful gift, and doubtless there are men to whom a new situation or sudden turn in a case comes like a flash of light. A lawyer once listened with great patience while the opposing counsel abused his client, and then getting on his feet he replied: "May it please the court, my learned opponent's clients are all saints, and as to his witnesses, they are simply spirits of just men made perfect." This was the same keen-witted member of our profession who said: "In my county a new lawyer comes on every train, and they expect an old one to go out on every hearse." An anecdote related of William Fullerton is, that a woman solicited charity from him and would take no refusal, saying: "Oh, Mr. Fullerton, the Lord has blessed you throughout your life," to which the famous advocate replied: "Well, that is so, but he seems to have deserted me now," and the indignant lady departed.

Now, to sum up: No advice or hint is given as to how to conduct law practice or try cases. If any man seeks law practice there is one road for him to travel and it is not a royal one. He must get the best facilities and work hard. It does no good to blame the public for failure to appreciate him. The people do find us out and their judgment is apt to be far better than we think. They know who attends to business, and if any one of us is a drone in the legal hive they know him. He who is willing to grapple with a hard proposition and stick to it till he masters it, is the one whom the people will trust.

A wonderful legal contest is now going on in New York city. Can any one who even casually reads the papers, fail to see the faithful labors and preparation, in short, the work out of court, done by the District Attorney and his famous opponent in the Thaw trial? Can any lawyer, old or young, read this trial and not see how opportunity comes to a man and makes his fame world-wide, perhaps in a single day? Dr. Johnson has told us that the writer of dictionaries has been "considered not the pupil but the slave of science, the pioneer of literature, doomed only to remove rubbish and clear obstructions from the path through which learning and genius press forward to conquest and glory without bestowing a smile on the humble drudge that facilitates their progress." Still, I make a plea for the humble drudge in law. He does well to toil and dig. He is making the road smooth. His day of conquest and glory may be far off or near, but if he is ever to find it, probably not brilliant genius but faithful industry will push him to the front and crown him with honor.

*Lewis E. Stanton.*

## A SPANISH OBJECT-LESSON IN CODE-MAKING

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The nineteenth century bids fair to be remembered as the age of codification (or rather re-codification) of the Civil Law. Commencing in 1804 with the Napoleonic Civil Code, which, it is increasingly apparent, affords the most enduring monument to the genius of the ill-fated Corsican, the century closed with a parallel achievement in the promulgation of the Code which marked the unification of substantive law for the German Empire. Between these two great landmarks appeared other codes of lesser fame—such as that of Bogisic the law-giver of Montenegro—and one which, though little known to American lawyers, and still less to American legislators, may yet exercise a stronger influence upon American jurisprudence than any of its contemporaries.

### HISTORY.

The *Código Civil* is the late ripening flower of Spanish juridical evolution. By a strange coincidence this product of Hispanic genius appeared in the centennial year of the French Revolution and of the events that mark the first practical workings of the great land-mark of American public law—the Federal Constitution. But the code formally promulgated in 1889 was the out-come of a movement begun more than three-quarters of a century previous and stimulated by still earlier efforts at codification on the part of Spanish jurists. With the possible exception of Italy no nation indeed has an ampler juridical background. But Spanish codification preceded Italian, for the earliest Spanish Code (*Siete Partidas*) based largely on the law of Rome, appeared soon after the middle of the thirteenth century, while in Italy the revived study of the Roman law had begun only with Irnerius at Bologna in the century preceding. Other codes of superior merit were produced in Spain from time to time, such as the *Ordenamiento de Alcald* in 1348, and the *Leyes de Toro* of 1505.

### LEGAL CHAOS IN SPAIN.

But the defect of these codes as of the Spanish legal systems generally, was lack of universality. The ancient petty kingdoms which were gradually merged into the Spanish monarchy

retained, for the most part, each its own system of laws. A Code of Castile, however excellent in form and contents, might have no force in Catalonia. Indeed at and prior to the beginning of the nineteenth century no less than six diverse juridical systems prevailed in various parts of Spain and the result, in the language of the learned Spanish jurist, Sánchez Román,<sup>1</sup> was "the most anarchical multiplicity, the greatest lack of harmony with historic reality, vagueness, uncertainty and the most complete chaos."

It is clear that this condition presented a problem more serious even than that which confronted the French law reformers of the first national assembly, or those who framed the Code Napoleon fifteen years later. The diversity and confusion in the law of pre-revolutionary France was great, but not so great as that of Spain at the corresponding period. Besides the Spaniards are a more conservative people and the different regions of the peninsula cling more tenaciously to their peculiar "*fueros*" and customs.

#### THE AMERICAN ANALOGY.

The situation was rather more analogous to that which prevails to-day in the states of the American Union. Except in Louisiana we have as the basis of our jurisprudence the English common law. But the whole tendency of our federal system, with the increase in the number of states, in legal theory sovereign and foreign to each other, has been toward juridical diversity. A legislature, supreme in its own sphere, sending forth new statutes year after year—a court of last resort, independent of every other, constantly making new precedents with the force of law—such are the forces at work in each of our nearly half a hundred states to develop a system of jurisprudence of its own. Even our law schools accelerate this tendency, for each naturally lays particular stress on the law of the state of its location. If not already so, will not the words of the Spanish jurist above quoted soon be applicable to the condition of our American law? No active practitioner any longer attempts to keep abreast of the jurisprudence of any state but his own. In entering the courts of another he is on ground almost as strange as if he were practicing in a foreign country.

It is of course not merely or mainly the professional class that suffers from this condition. In these days of enterprises

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1. *Estudios de Derecho Civil* (Studies in Civil Law), Madrid, 1890, p. 500.

conducted on a national and even international scale, it is the business interests which must ultimately feel most keenly the inconvenience of subjection to fifty diverse juridical systems in one country. Hence the inspiration of such efforts as that toward the adoption of a uniform statute on negotiable instruments which is nothing more or less than a movement for the codification of one branch of the commercial law. Is it not worth while in this connection to follow the course of another nation, which under somewhat similar conditions, has codified not alone its commercial, but its entire body of law?

#### THE MODERN CODE MOVEMENT.

It was this chaotic condition of her jurisprudence that hung like an incubus over Spain in the opening years of the nineteenth century. In that period, as the author already quoted observes, began "a series of events, of diverse character, realized under distinct initiative and with variety of result, but all inspired and caused by a single thought—the codification of our civil law." The movement found clear expression in the Cadiz Constitution of 1812, the instrument which marks the real beginning of Spain's modern constitutional history. That instrument, voicing aspiration rather than announcing actuality, declared: "*un solo Código Civil regirá en todos los dominios de la monarquía española*" (one civil code only shall be in force throughout the dominions of the Spanish monarchy). The same Cortes which framed the constitution adopted, as early as February, 1811, a proposal presented by the deputy Espiga y Gadea, for undertaking as soon as practicable the codification of the Spanish law in all important branches including civil, penal and remedial. In 1813 the Code Commission composed of five distinguished Spaniards was appointed by the same body, but the reaction of the following year prevented any real results, and a second commission named in 1821, met a similar fate. The movement now passed for a time from official into private hands and several drafts or projects appeared from time to time, one being presented to the Cortes in 1839. In 1843 a royal decree was issued naming a General Code Commission of twenty-four under which the work of codification was well started, but which was succeeded three years later by a smaller commission which completed its labors in the form of a draft of a Civil Code in 1851.

The instrument thus framed after forty years of effort marks an epoch in the history of Spanish jurisprudence. While open to criticism in respect to classification and terminology, it con-

tained many new features borrowed from foreign sources, and showed that its framers were diligent students of comparative legislation. Not only did they make use of the juriconsults and commentators, but the Code Napoleon supplied many ideas, like the institution of the family council, which were thus introduced into Spanish law for the first time. But the new project also in some features followed closely the law of Castile and this was one of the causes of opposition. Partly by reason of this and partly because the country was not yet ready for the great reform, the project of 1851, like its predecessors, was to remain unrealized in its existing form.

#### REALIZATION.

In the period which followed, the reformers devoted themselves to the codification of specific branches of the law, such as the mortgage law, the notarial law, the law of waters, etc., much as our law reformers are now attempting to secure the enactment of a uniform statute governing divorce and another pertaining to negotiable instruments. This kept alive interest in the subject and paved the way for greater results. Finally in 1880 a Royal decree was issued providing for a general codification of the Spanish law on the basis of the draft of 1851, and naming a commission of eminent jurists to undertake the task. Two circumstances, both highly suggestive, now favored the successful consummation of the movement. In the first place each member of the commission was chosen from one of the several regions into which the peninsula was juridically divided. This favored the selection of the best features of each, tended to prevent the undue preponderance of any, and encouraged the harmonizing of differences. Another aid was the calling of juridical congresses in these different regions and the consideration by them of those features of the local law which most deserved incorporation into a national code. Such congresses were held at Saragossa in 1880, at Madrid in 1886 and at Barcelona in 1888, and the programs, practical and yet scientific, were highly instructive and helpful. Opposition had not disappeared and the exigencies of Spanish politics tended to delay the consummation. But in 1885 the distinguished jurist Silvela was Minister of Grace and Justice and he obtained the authority of the Cortes to publish a Civil Code framed on a new basis, but utilizing the work of previous years. This project, after exhaustive discussion and approval by both chambers of the Cortes, received the royal assent on May 11, 1888, and became

substantially the law of all Spain on May 1, 1889, exactly nine years before the tragic battle of Manilla Bay.<sup>2</sup> On July 31, the new Code was extended to Cuba, Puerto Rico and the Philippines where, with some slight modifications, it has ever since remained in force. Strange irony of fate that led the Spanish lawmakers to legislate so minutely and elaborately for the Colonies which they were so soon to lose! Fortunate event which gave to each of these regions, on the eve of a new and then unexpected career, a system of laws fitted to conditions both old and new, yet embodying the best results of juridical experience and scientific thought!

#### CHARACTER OF THE CODE.

Of the instrument brought into existence by this long and laborious process only a brief and inadequate mention is permissible here. Its real and historic basis, even more than that of the *Siete Partidas*, is the Roman law of the Golden Age and it comprehends the subjects of Persons, Property and Obligations in the same order and with much the same phraseology as the Institutes of Justinian. The subject of the fourth book of the Institutes, relating to actions, is rightly omitted, however, because as a *Código Civil* this instrument includes only *private substantive* law, or that which treats of the rights and obligations of individuals *inter se*, and is not concerned with *remedial* law, including actions, which deals with the methods of enforcing such rights and duties.

Doubtless the Spanish codifiers profited much from the Code Napoleon, but we have it on the authority of the eminent French jurist Levé, that the Spanish Code is the superior. When it first came to the attention of critical American judges and lawyers in our new possessions they were amazed at its comprehensiveness and completeness—charmed with its clearness, conciseness and simplicity. They, who were wont to engage in the tedious and reason stifling process of pursuing, through the maze of precedent, with the lame assistance of cumbrous digests, voluminous treatises and multitudinous reports, some fine point in the law of Contracts or Real Property, found in this brief Spanish Code, smaller than almost the least of American text books, a logically arranged group of principles from which the law applicable to a given case could be deduced rationally and with little difficulty. Coming at an epoch when business inter-

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2. In Catalonia and Aragon its force is still somewhat qualified; in a few other provinces the old *fueros* still remain.



ests as well as the legal profession are beginning to demand relief from

"The lawless science of our law  
The Codeless myriad of precedent,"

this discovery of the achievement of the hitherto unappreciated Spaniard is most timely and serviceable. It is one of the far-reaching consequences of the Spanish-American war which was never foreseen and is even now little suspected. Much has been said and rightly of the improvements of the courts of our insular possessions through the introduction of the simpler and more practical American system of procedure. The benefits will not be altogether one-sided if through this contact of legal systems the American people shall learn the merits of the Spanish *Código Civil* and from it the feasibility and gain of codifying their private substantive law.

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## WRITS OF ERROR AND APPEALS FROM THE NEW TERRITORIAL COURTS.

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The extension of the civil government of the United States over the new insular possessions has been attended by many difficult legal questions, the discussion of which in the "Insular Cases," and others of like character, in the United States Supreme Court, has attracted much attention. Besides the vital questions of constitutional law and jurisprudence—such as the distance at which the Constitution, in whole or in part, "follows the flag,"—there are others, technical, but important, relating to the procedure necessary to bring the cases before the Supreme Court.

The importance of these technical questions is emphasized by the fact that the maxim "*boni judicis est ampliare jurisdictionem*" does not appear always to commend itself to the United States Supreme Court, which at times shows a tendency to construe most strictly the statutes by which its jurisdiction and procedure are regulated, so as to avoid jurisdiction if possible. This tendency finds expression in decisions dismissing appeals without passing on the merits, because the proper remedy is held to have been writ of error, and *vice versa*.

The purpose of this discussion is to outline briefly the procedure necessary to invoke the appellate jurisdiction of the U. S. Supreme Court in cases coming up from Porto Rico, from Hawaii, and from the Philippines. As might be expected from the haphazard and unscientific character of American legislation, there is an entirely different system of appellate procedure for each of these three new possessions.

Porto Rico has the simplest system, and presents few questions. The statute on the subject provides for territorial courts, and for a United States District Court having also the usual jurisdiction of a Circuit Court. The United States Supreme Court has appellate jurisdiction over both the Territorial Supreme Court and the United States District Court, in the same cases and under the same procedure as over the Supreme Courts of the regular Territories (sec. 35 of the Foraker Act, 31 U. S. Stat. 85). The rule for such territorial appeals is simple and well established. There the remedy is by writ of error "in cases of trial by jury," and "in all other cases by appeal," on a statement of facts in the nature of a special verdict (18 U. S.

Stat. 27).<sup>\*</sup> With this plain test there can be little difficulty in determining upon the proper remedy in any given case. There is no review by the Circuit Court of Appeals in any event (*Royal Ins. Co. v. Martin*, 192 U. S. 149; *Armado v. U. S.* 195 U. S. 172).

Hawaii presents a different and more complicated system of judicial review. The statute provides, as in the case of Porto Rico, both for territorial courts and a United States District Court, having also the jurisdiction of a Circuit Court. The judgments of this District Court are reviewable in the Circuit Court of Appeals for the Ninth Circuit on writ of error or appeal, in the same manner as those of other United States District Courts. The judgments of the highest territorial court are reviewable in the United States Supreme Court on writ of error only, and in cases in which such a writ would lie to the highest court of a State (31 U. S. Stat. 158, Sec. 86, *Ex parte Wilder's Steamship Co.* 183 U. S. 545).

An appeal or writ of error may be taken from the United States District Court of Hawaii direct to the United States Supreme Court, if the case involves questions which would allow such review of the determination of a United States District or Circuit Court in one of the States (*Hawaii v. Mankichi*, 190 U. S. 197). In such a case the Circuit Court of Appeals has no jurisdiction (*Wright v. MacFarlane & Co.* 122 Fed. Rep. 770).

Porto Rico is thus assimilated to a Territory and Hawaii to a State, in matters of appellate procedure.

In the Philippines there are no strictly Federal Courts, but a Supreme Court continued by act of Congress with general jurisdiction, both legal and equitable. The statute which gives an appeal from this court provides that its final judgments and decrees in causes involving "the Constitution or any statute, treaty, title, right or privilege of the United States," or an amount or value of more than \$25,000, may be reviewed by the United States Supreme Court "on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the circuit courts of the United States" (U. S. Stat. Vol. 32, Part I, p. 695, Sec. 10).

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<sup>\*</sup> Oklahoma is an exception to this rule. The judgments of its highest court are reviewable in the same manner as those of a U. S. Circuit Court, and a writ of error must be employed in actions at law, even if there has not been a jury trial. 26 U. S. Stat. 81; *Comstock v. Eagleton*, 196 U. S. 99.

This would seem to leave the procedure sufficiently elastic to enable the United States Supreme Court to take jurisdiction in all such cases where the method used to bring the cause before it is not manifestly inappropriate and erroneous. Yet there have been already several dismissals because a writ of error was used instead of an appeal, or *vice versa*, in cases where the question was, to say the least, a close one, and where the court could have assumed jurisdiction without contravening any express statute or settled rule of law.

In *Behn, Meyer & Co. v. Campbell*, 200 U. S. 611, the action was in the nature of *assumpsit*, and the appeal was dismissed for the want of jurisdiction, upon the authority of cases holding that judgments in such actions in United States Circuit Courts were reviewable by writ of error only. On the other hand, in the Barcelona habeas corpus case (*Fisher v. Baker* 203 U. S. 174), a writ of error to review an order dismissing a petition for habeas corpus, on the ground that the privilege of the writ had been suspended, was dismissed on the ground that such orders were reviewable only by appeal. Very grave constitutional questions were involved in this case and were elaborately argued at the bar. The decision was put upon the authority of certain prior decisions cited by the court holding that in the United States Circuit Courts, habeas corpus proceedings were properly reviewable by appeal under the statutes relating thereto. There had been, however, no prior decisions holding that where only questions of law were to be presented, a writ of error would not lie, and in fact such writ is necessarily used in reviewing habeas corpus proceedings in the State courts. (See *Tinsley v. Anderson*, 171 U. S. 101, *Hatch v. Reardon*, 204 U. S.—).

In reviewing judgements of the United States Circuit Courts the question is comparatively simple. Judgments at law and in criminal causes are reviewable by writ of error; decrees in equity and admiralty are reviewable by appeal; habeas corpus proceedings, it is now settled, are likewise reviewable by appeal; and any other special statutory proceedings in such manner as may be provided by the statutes regulating them. But the jurisdiction of the United States Circuit Courts by no means covers the whole field of jurisprudence. These courts have no jurisdiction over matters of probate and administration; marriage and divorce; incompetency and guardianship; adoption and filiation—all of which would or might come within the jurisdiction of the Philippine courts, and in a proper case, be reviewable by the United States Supreme Court. The question is made still more

difficult by the complicated structure of Philippine law, which consists of a basis of Civil Law with an overlying layer of American Statutes enacted by Congress and by the Philippine Commission, contributing elements of "Common Law" jurisprudence and procedure. The two systems are so different—in some respects so inconsistent—that it is often very difficult to determine to what category, according to American legal terminology, a given action or proceeding belongs, in order to decide which of the two methods of review to adopt.

In theory, and in their historical development, the two methods are easily differentiated. An appeal is addressed by the defeated party to the court below, which issues its citation to the other party to appear in the appellate tribunal, and sends up to that tribunal the whole record with all the testimony. The whole case is presented to the appellate tribunal for review upon both the law and the facts (*Wiscart v. d'Auchy*, 3 Dallas 321; *Johnson v. Harmon*, 94 U. S. 371). This method of review is taken from the Courts of Chancery and Admiralty, whose procedure so largely follows that of the Civil Law. It is also used, with certain modifications as to the required contents of the record, in States which, like New York, have attempted to abolish the distinction between law and equity, and have adopted a uniform system of procedure, and it would seem eminently appropriate for the appellate jurisdiction over the Philippine courts, with their civil law procedure.

A writ of error, on the other hand, is in theory a mandate from the court above, commanding the court below to send up the record of a cause, so that errors of law, apparent thereon, may be reviewed and corrected. It is addressed to the court and not to the party, and only so much of the record as is necessary for a proper presentation of the question involved is transmitted. It is essentially a common-law remedy and applicable primarily to the review of common-law trials, where all questions of fact are settled conclusively by a jury's verdict, and only pure questions of law remain for review. There is no logical juristic reason, however, why it should not be applicable to any cause of any nature, in which questions of law only are sought to be reviewed, and in fact it was the only method of reviewing in the United States Supreme Court the judgments and decrees of the lower federal courts until the judiciary amendment of 1803. (See 1 U. S. Stat., 84; 2 U. S. Stat., 244). But law, and particularly the law of procedure, is such a patchwork of decisions

and statutes, uncorrelated and often inharmonious, that logic has little or nothing to do with it.

It therefore becomes necessary to consider how far the rules of procedure established for the review of United States Circuit Court judgments furnish precedents for the review of Philippine Supreme Court judgments, involving the necessary jurisdictional questions or amount, especially in cases not analogous to any within the Circuit Court jurisdiction. The Behn, Meyer & Company case may be regarded as settling the rule that all actions in the nature of *assumpsit* must be reviewed by writ of error. The same rule would doubtless apply to all actions of a strictly common-law character in which judgment for a sum of money only, or for the delivery of a specific chattel or the possession of a specific parcel of real property is demanded. It also applies to criminal prosecutions. (See *Dorr v. U. S.*, 195 U. S. 138; *Kepner v. U. S.*, 195 U. S. 100; *Trono v. U. S.*, 199 U. S. 521).

All suits which, if brought in a Circuit Court, would lie on the equity side, and all proceedings in admiralty, would certainly be reviewable by appeal. The Barcelon case establishes that habeas corpus proceedings are also reviewable by appeal only, and not by writ of error.

The case of *De la Rama v. De la Rama*, 201 U. S. 303, determines that actions for divorce involving alimony or a division of conjugal property of the jurisdictional amount, are reviewable by appeal. Since the reversal in this case was on a question of fact the court necessarily determined that appeal was the proper method of review. This decision appears to be the first instance in which the United States Supreme Court has ever passed on the facts in a divorce case.

Aside from these few decisions there appear to be no direct precedents to guide the litigant who wishes to have a Philippine judgment reviewed by the United States Supreme Court. The nearest analogy will be found in the decisions upon cases coming up from the District of Columbia, where the practice is also assimilated by statute to that followed in reviewing Circuit Court judgments (sec. 705 U. S. Rev. Stat., 27 U. S. Stat. p. 434), and where the courts, like those of the Philippine Islands, are of plenary, as distinguished from merely federal, jurisdiction.

From this source the following suggestions may be gathered: Final orders granting or refusing probate of a will are reviewable by writ of error. This was held in *Ormsby v. Webb*, 134 U. S. 47. The court said that "a proceeding involving the original probate of bill is not strictly a proceeding in equity," and that "if

it be not a case in equity, it is to be brought to this court upon writ of error, although the proceeding may not be technically one at law, as distinguished from equity." In this case there had been a jury trial of certain issues of fact, but the same rule as subsequently applied to a case in which the court had acted without a jury (*Campbell v. Porter*, 162 U. S. 478). In view of the historical development of probate jurisdiction, which originally belonged primarily to the ecclesiastical courts with their civil law jurisprudence and procedure, including appeal as the invariable method of review, the decision in these two cases seems to be an exception to the tendency to avoid jurisdiction.

In other proceedings pertaining to what is usually called probate jurisdiction a different rule is followed, as shown by the case of *Kenaday v. Sinnott*, 179 U. S. 606. This was a controversy raised by objections to an executor's final account. The court held that this was "in its nature of equitable cognizance," and that the decree was "properly reviewable on appeal rather than on writ of error." The appellant in this case first sued out a writ of error and then obtained the allowance of an appeal, the order reciting "that the practice in cases exactly of the character of the present one has not been established by precedent." The other party moved to dismiss the appeal because of the previous issue of the writ of error, and to dismiss the writ of error because the proper remedy was by appeal. The court denied the first motion and considered the case on the merits, and the second motion thus became of no consequence. A suit for the construction of a will is also reviewable by appeal (*Cruit v. Owen*, 203 U. S. 368).

The somewhat anomalous result is thus reached that a decree granting or refusing probate of a will can be reviewed on the law only, while a controversy over its construction or over the accounts of its executor may be reviewed on the facts also.

Proceedings for the condemnation of real property have been held to be analogous to an action at law and hence reviewable by writ of error only (*Metropolitan R. R. Co. v. District of Columbia*, 195 U. S. 322). Proceedings by mandamus and prohibition are also deemed to be at law and are therefore reviewable by writ of error (*Steinmetz v. Allen*, 192 U. S. 543; *Lowry v. Allen*, 203 U. S. 476; *Smith v. Whitney*, 116 U. S. 167).

If trial by jury is ever introduced into the Philippines the ruling in the cases of *Elliott v. Toeppner*, 187 U. S. 327, and *Grant Shoe Co. v. Laird Co.*, 203 U. S. 502, will doubtless apply, namely, that even in bankruptcy proceedings, if a trial by jury

is had as a matter of right, it must be regarded as "a trial according to the course of the common law," and the judgment thereon "revisable only on writ of error."

From the cases examined the following tentative classification may be made of the proper remedies to obtain a review of Philippine judgments and decrees subject to the appellate jurisdiction of the United States Supreme Court by reason of finality and of the questions or amount involved.

Proceedings analogous to ordinary civil actions at law.	}	Writ of error.
Criminal prosecutions.		
Condemnation proceedings.		
Proceedings by mandamus and prohibition.		
Proceedings to prove a will.		
Suits of an equitable nature.	}	Appeal.
Matrimonial actions.		
Accountings in courts of probate jurisdiction.		
Habeas corpus proceedings.		
Proceedings in admiralty.		
Proceedings in bankruptcy (without jury trial).		

In all cases where there is any uncertainty, the course followed in *Kenaday v. Sinnott* (*supra*) may be adopted, and both remedies used. In such a case it would be a wise precaution to take an order allowing the appeal and reciting the uncertainty, and also to have a record so made up as to be sufficient under either form of review; that is to say, containing all the evidence to allow full review upon the appeal, and also a proper bill of exceptions, duly allowed by the trial judge, to present such questions as may be raised upon the writ of error.

Doubtless in time precedents will be created which will cover most of the categories of legal proceedings and establish rules of procedure approximately certain until disturbed by further legislation.

It would seem that Congress might easily have established some test, appropriate to the prevailing procedure in the Philippines, and as simple as that applied to ordinary territorial appeals, or might have provided for a uniform method of



review, by writ of error in all cases, as in the early days of the Supreme Court, or by appeal in all cases, with such limitations as to the return of evidence and review of facts as might be deemed advisable. But Congress has not done so, and the system must now be worked out at the expense of those litigants whose counsel are not fortunate enough to foresee the United States Supreme Court's decision as to the particular category, under one system of legal terminology, to which to assign a given proceeding under a totally different system.

*Howard Thayer Kingsbury.*

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## GOVERNMENT LAW SCHOOL OF SIAM.

Siam has a government law school, under the control of the ministry of justice, such as formerly existed in Japan. Graduates are generally appointed at once either judges of minor courts or public prosecuting officers. In 1904-5 it had one hundred and ten students, but in 1905-6 only ninety-eight. Most Siamese law students are educated here, but it is evident either that the instruction is inadequate, or the standard for the final examinations exceedingly high, since of one hundred and ninety-five who were examined in January, 1906, only twelve passed. The previous year one hundred and seventy-seven were examined and ten passed.

## PRACTICING MEDICINE. WHAT CONSTITUTES.

The Supreme Court of New York in the recent case of *State v. Allcutt* (not yet reported) holds that one who assumes the prefix "Dr.," displays in the window of his residence his name followed by the words "Mechano Neural Therapy," receives, examines and treats patients by touching them with the tips of his fingers, and gives direction as to diet, receiving compensation for his services, is engaged in practicing medicine within the purview of the Statute making it a penal offense so to do without a license. The defendant neither administered nor recommended drugs of any kind, but simply claimed that all ailments were attributable to defective circulation, which his treatment restored to a normal state.

Such restrictive statutes are constitutional, being a valid exercise of the police power of the state. *State v. Webster*, 41 L. R. A., 212, and cases cited at page 217. The purpose of the

legislation is to protect an unwary public from the evils of charlatanism and empiricism, ignorance and quackery; and in this day and age there can be no denying the fact that it is of the most salutary description. People are continually ready to be imposed upon, and there are countless persons ready to prey upon their credulity.

The statutes on this subject vary greatly, and therefore the same state of facts will, in different states, call for different results. It is quite generally the case that the legislative body has defined what constitutes practicing medicine within the provisions of the act, but in the absence of such, a much greater latitude is accorded to the courts, and the question is necessarily involved of whether the phrase is used with its common general meaning or a technical sense. On this the courts are variant. *Bragg v. State*, 134 Ala. 165. If the former, then its scope is much more restricted. But it is safe to assert that in no court does the rule still obtain that the administration of drugs is the *sine qua non* of practicing medicine. It is a progressive science, and as such, views as to treatment are now recognized that a century ago would not only have been discountenanced but ridiculed, and *vice versa*. So the courts neither attempt to nor can they lay down any hard and fast rule on the subject. *People v. Phippin*, 70 Mich. 6.

The main case by clear inference adopts the view that a diagnosis is an essential and integral part. This is to be regretted, as it opens the door to many an impostor and quack. Magnetic healers, (*Parks v. State*, 159 Ind. 211); cancer doctors, (*Musser v. Chase*, 29 Ohio St., 577); ophthalmologists, (*State v. Yegge*, 103 N. W. 17 S. D.); one who engages to cure alcoholism, (*Springer v. Dist. of Col.*, 23 App. D. C., 59), or the opium habit, (*Benham v. State*, 116 Ind. 112); an obstetrician, (*State v. Welch*, 129 N. C. 529) have all been held to be within the statute. A druggist who applied lotions to a lacerated finger, the other party believing him to be a physician, was held to be practicing medicine under a statute defining it as "to treat, operate on, or prescribe for any physical ailment." *Matthei v. Wooley*, 69 Ill. App. 654.

It is to be lamented that the lines cannot be drawn more closely as to Christian Scientists, as imposition in its worst form is perpetrated under the shield and cloak of religion. They have offices, receive patients, style themselves in many cases "practitioners," and receive compensation for their services. They attempt to cure nearly every disease that flesh is heir to. This is a dual paradox, and it is by reason of it that they are immune from the operation of the ordinary statute. They attempt to cure, and yet they do not claim to do so *per se* but by invoking Divine interposition. They deny all disease, and yet they endeavor as above to alleviate or cure the physical or mental abnormalities that can only be predicated on it. It appears that no such play upon words should relieve the case from its true construction, therefore the Nebraska Court has held it to be the practice of medicine under a usual statutory

definition. *State v. Buswell*, 40 Neb. 158; *contra*, *State v. Mylod*, 20 R. I., 632. More stringent statutes should be passed or a more liberal interpretation given to existing ones. The language used in the New York case justifies the conclusion that no prosecution can be successfully maintained against a Christian Scientist in that state. It is far from the intention to state that every one who entertains the beliefs sanctioned by this sect and who follows its teachings should be considered as practicing medicine, but the assertion is made that its exponents, who hold themselves out professionally as engaged in whatever is in reality "the healing art," although that particular nomenclature is repugnant to their tenets, should be considered as within the reason and spirit of the statute.

The point on which there is the widest diversity of opinion is in regard to osteopaths. On either side, a cluster of decisions may be found, but the decided weight of authority is to the effect that they are engaged in the practice of medicine. *Jones v. People*, 84 Ill. 453. A knowledge of anatomy, physiology, hygiene, histology and pathology is essential to them, as it is to them as it is to a regular physician, and the only point of distinction is as to therapeutics, and the day has passed when all reliance is placed in drugs. Their value in many cases is indisputable, yet there are diseases in which other forms of treatment are far more efficacious. Consumption is instanced. And yet it would be an anomaly to say that persons engaged in these other modes of treatment were not practicing medicine. The Alabama Court in the case of *Bragg v. State* (*supra*), in an exceedingly interesting decision, traces the development of the science and demonstrates that in its primary sense it applies to the art of treating or of attempting to cure or alleviate any mental or physical ailment by any means whatever, and in its popular acceptance the term has become materially perverted.

The cases will be found collated and the subject discussed in 3 L. R. A. (N. S.) 763, note to *O'Neill v. Tennessee*; and *Am. & Eng. Enc. of Law*, 2nd Ed., Vol. 22, p. 785.

#### PROFESSIONAL CONDUCT—SOLICITING BUSINESS.

In the case of *Ingersoll et. al. v. Coal Creek Coal Company*, 98 N. W. 178, the Supreme Court of Tennessee availed itself of an opportunity to denounce as unprofessional a lawyer's active solicitation of business. A mine explosion had occurred, causing great loss of life and many injuries. A young lawyer, Chandler, was one of many attorneys who rushed to the scene of disaster. The Court of Chancery stated that Chandler "entered actively into competition for business, that he boldly and openly saw widows and others whose husbands and next of kin had been killed in the explosion, and sought as other lawyers were doing, to have them entrust the prosecution of suits to his firm, but that it does not appear that he practiced any fraud or deception, or made any false representations to get the cases for his firm." Chandler secured some forty cases which were to be prosecuted on a contingent fee and of this he was to receive a portion from

Ingersoll and Peyton, the law firm for whom the cases were solicited. This firm prepared and filed declarations in all the cases and prepared to try them. The Coal Company, through their general counsel, employed other counsel or agents and negotiated settlements, ignoring Ingersoll & Peyton, the complainants in this case, the attorneys of record in the damage suits. It was conceded that the plaintiffs had the right to recover for their services unless they were precluded from recovery by unprofessional conduct. The court said:

"We are of opinion that, under the facts disclosed by the finding of the Court of Chancery Appeals, complainants are not entitled to recover, because these facts show acts of impropriety inconsistent with the character of the profession and incompatible with the faithful discharge of its duties. We cannot agree to several propositions advanced by complainants. We cannot agree that in these latter years a spirit of commercialism has lowered the standard of the legal profession. We cannot agree that the practice of law has become a "business" instead of a "profession," and that it is now allowable to resort to the practices and devices of business men to bring in business by personal solicitation, under the facts shown in this case. As to how far an attorney may go in soliciting business, or whether he may solicit at all, we are not called upon to decide; but when such a case is presented, as is disclosed in this record, of attorneys rushing to the scene of disaster in hot haste, and competing with each other in soliciting the bereaved ones to allow them to sue for their losses, we feel that we are called upon to say in no uncertain terms that such conduct is an act of impropriety and inconsistent with the character of the profession. We cannot, we dare not, lower the standard of the legal profession to that of a mere business, in which fleetness of foot, or the celerity of the automobile, determines who shall be employed. The miserable victims of the disaster are dazed by the terrible bereavement. They are in no condition to consider their rights to damages. In their extremity, they fly to any one promising relief, when, if left to time and more mature consideration, they would be enabled to make, perhaps, a better choice. In addition, it is unbecoming a member of the profession, and a public scandal, and when he bases his right to recover fees upon such improper conduct, and lowering the character of the profession and the court, it is no excuse that other attorneys do the same; but this is rather a reason why this court should act promptly and decidedly, in order that an end may be put to the practice. It is no excuse that corporations which have caused such disasters have been alert to send their agents and representatives to the scene with a view of forestalling suits and making favorable compromises. This court has never failed to condemn this practice in the strongest terms; and, whenever a case has come before it which in any way smacked of fraud or undue advantage arising out of such conduct, this court has not been slow to disregard or set aside improper or hard settlements. But such agents of corporations are not, as a rule,

officers of the court, nor do they occupy that high status which the law places the attorney upon; and we think that we can safely say that if any attorney should make such settlement, under such circumstances, this court would not hesitate to disbar him. It is said that there is no precedent for refusing fees because of such conduct. If this be so, we are admonished by the record in this case that it is high time that such a precedent be set, and in such terms as may not be mistaken or misunderstood."

This particular phase of professional conduct does not seem to have been before presented for judicial consideration. To that extent the present case is peculiar. Text writers and cases in dealing with professional conduct are concerned chiefly with grounds for disbarment. They thus treat particularly aggravated cases of fraud and instances of gross misconduct. Soliciting business by a professional man is nearest akin to advertising. Both the legal profession and the medical profession in their respective associations have discussed and condemned such practices as opposed to public welfare and not in line with the highest professional ideals. An eminent jurist has said, "The world relies on the lawyer to tell what the conduct of one man should be to others." On account of such an influential position in a community it is important that the honor and dignity of the profession should be maintained and that a professional pride should prompt all lawyers to hold aloof from common commercialism that cannot but lower the dignity of the bar. As a lawyer is an officer of the court, so the judge of the court has discretionary powers in the punishment of unprofessional conduct. Chief Justice Taney, in *Ex Parte Secombe* (19 How. 9) speaking of the court's power to disbar, said, "The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the Court, or from passion, prejudice or personal hostility, but it is the duty of the Court to exercise and regulate it by sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the Courts as the rights and dignity of the Court itself." The Supreme Court of Tennessee in the present case has most strongly asserted this power of the judiciary to discipline lawyers not only in disbarable misconduct, but requires of them as officers of the court a liability for unprofessional acts not reached by statute or the letter of the law.

Many states guard against solicitation of legal business in some of its forms by statute. In *Langdon v. Conlin*, 67 Neb. 243; *Alpers v. Hunt*, 86 Cal. 78, a contract by an attorney to pay a layman one-third of his fee if layman procures the employment of the attorney by a litigant, is contrary to public policy. The court says, "Such practice would tend to increase the amounts demanded for professional services. In such a case an attorney would be induced to demand a larger sum for his services, as he would have to divide such sum with a third person."

It is important that the legal profession be respected by people of all classes. The decision in *Ingersoll v. Coal Creek Coal*

*Company* will have a tendency to bring about this result by its condemnation of a practice which has become prevalent in certain localities.

#### FUGITIVE FROM JUSTICE.

The decision of the Supreme Court of the United States in the recent case of *Appleyard v. Massachusetts*, handed down December 3, 1906, is of interest not because the result reached was novel or unexpected but for reason of the fact that it is a final and complete adjudication of a matter on which the position assumed, while supported by the decided weight of authority, was yet the subject of some contrariety of opinion. It embodies a construction of the term "fugitive from justice," as found in the act of Congress respecting interstate extradition, and sanctions the proposition that the *actual intent* of the alleged offender, in leaving the jurisdiction where the crime was committed, is not material to a determination of his *status*.

The case of *Pettibone v. Nichols*, was passed upon immediately preceding by the same court. (See Comment XVI, YALE LAW JOURNAL 347). While cognate to the present case in many particulars, the principle announced is distinctively different; it there being held that a circuit court of the United States, when asked upon *habeas corpus*, to discharge a person held in actual custody by a state for trial in one of its courts under an indictment charging an offense against its laws, cannot properly take into consideration the methods whereby that custody was obtained.

The decision in *Appleyard v. Massachusetts* is a confirmation of the *dictum* in *Roberts v. Reilly*, where it was said, "To be a fugitive from justice, in the sense of the act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having committed within a state that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another." 116 U. S. 80. This *obiter dictum* had been followed by several decisions in state courts. *State v. Richter*, 37 Minn. 438; *Hibler v. State*, 43 Tex. 197, 201; and others cited in principal cases. In the Minnesota case the statement is made, "the important thing is not their purpose in leaving, but the fact that they had left, and hence were beyond the reach of the process of the state where the crime was committed," and again, "the simple fact that they are not within the state to answer its criminal process, when required, renders them, in legal intendment, fugitives from justice, regardless of their purpose in leaving." These cases represent the weight of authority, both logically and numerically.

As opposed to the prevailing view may be cited *Degant v. Michael*, 2 Ind. 396 and *United States v. O'Brian*, 3 Dillon 381. In the latter there was under consideration a state statute to

the effect that no indictment should be found unless within two years from the commission of the alleged offense, followed by a proviso that the bar or limitation should not extend to one fleeing from justice. The Court says, "it is necessary..... to determine the motives of the defendant in leaving the state" and further on, (referring to fleeing from justice), "it means to leave one's home, or residence, or known place of abode, with intent to avoid detection or punishment for some public offense against the United States." In Massachusetts also there seemed at one time a tendency to so construe the phrase as to require a consciousness of guilt in certain classes of cases. *OP. Atty. Gen. in Vinal case.* (1890.) In *ex parte Tod*, 12 S. D. 386, an unusual state of facts existed and a peculiar modification was imposed on the general rule. There the petitioner in *habeas corpus* had defrauded his employers. Subsequently he departed from the state at the request and direction of his employers and on their business. When sought to be extradited, it was held that he was not a fugitive from justice, and the following is quoted from the decision: "While it may not be necessary, to make a person a fugitive from justice, that he should leave the state where the offense is alleged to have been committed, with the intention, or for the purpose of, avoiding a prosecution, still we think it must appear that he left the state without the knowledge or consent, actual or implied, of the parties alleged to have been defrauded."

It is almost universally conceded that the party sought to be extradited must have been actually, physically present in the demanding state at the time of the occurrence of the alleged offense. A constructive presence will not be sufficient. It would indeed be a distortion of language not to be countenanced, to say that a person who had never set foot in a state, had fled from it. Accordingly, it was held that where a dealer in horses, residing in Chicago, had through the mails, effected a sale to a resident of Tennessee by means of false pretences, he could not be extradited from Illinois, never having been corporeally present in Tennessee. *Tennessee v. Jackson*, 36 Fed. 258. So also where the alleged criminal is only constructively present in a state at the time of the commission of a crime, he cannot be considered a fugitive from justice, although it be, that subsequent to said time, he has actually been in the state in which the crime was committed and which is now seeking his extradition. *People v. Hyatt*, 172 N. Y. 176.

The doctrine enunciated by the Supreme Court must appeal to every one as a most sound one. If the *animus* of the individual was the controlling factor, if his secret thoughts and motives had to be inquired into to ascertain whether or no he was a fugitive, it would to all intents and purposes emasculate the act of Congress on the subject. The subjective test must be repudiated as too vague, shadowy and uncertain for practical purposes. While the opinion does not expressly mention these objections, yet it is to be plainly inferred from the whole current of authority on the subject, that the matter was considered by the court in arriving at its conclusion.



## DYING DECLARATIONS.

The limitations on the admissibility of dying declarations are shown in the case of *State v. Thompson*, decided by the Supreme Court of Oregon and reported 88 Pac. 583. The accused was convicted of murder in the second degree and appealed from an alleged erroneous ruling of the court in admitting the dying declaration of his victim. The decedent was told by his physician that he had only a few moments to live. Preparatory to making the statements introduced in evidence, the decedent was asked what expectation of recovery he had, and he replied that he didn't know. The court held these statements were admissible as dying declarations.

The admissibility of dying declarations has been long recognized, but the law regarding them has not always been the same. Some of the very earliest cases show that such evidence might be admitted in civil suits, as when in an action on a deed, the dying declaration of a witness to its execution was admitted. *Wright v. Little*, 3 Burr. 1255. But in an action of ejectment reported in 17 St. Tr. 116, (1743) a distinction between the admissibility of such evidence in criminal and civil actions was pointed out and the necessity for admitting dying declarations in the latter was shown not to exist.

The modern doctrine regarding the admission of dying declarations insists upon the presence of well-defined circumstances at the time of the making of the declarations. They are only admissible in trials for homicide, *State v. Barker*, 28, Oh. St. 583; the death for which the accused is on trial must be that of the declarant. *Railing v. Com.*, 110 Pa. 103; the subject of the declarations must be the circumstances connected with the death for which the prosecution was instituted. *People v. Wong Chuey*, 117 Cal 624. It is only where these facts exist that statements of a dying declarant are admissible, and further, there must appear, preliminary to entertaining this evidence the fact that the declarant was in fear of impending death. *Mattax v. U. S.*, 146 U. S.; 140. Whether or not all these conditions are present must be decided by the court and then the evidence must be admitted or excluded accordingly.

That such declarations are only admissible in prosecutions for homicide is now well settled. This exception to the hearsay rule was originally made on the ground of necessity and it is only in criminal cases similar to the above that such necessity is now conceded to exist. It was said by Judge Ogden in *Donnelly v. State*, 26 N. J. L.; 617; "Such declarations are received as evidence from necessity, for furnishing the testimony which in certain cases is essential to prevent the manslayer from escaping punishment."

Another limitation recognized by the present doctrine is that the prosecution in which such evidence is to be admitted must have been instituted for the death of the person making the statements. Such dying declarations being admitted because of necessity in the case of secret murders, it is plain that the above

rule results naturally. *State v. Bohan*, 15 Kan. 418. Again the declaration sought to be introduced must concern the facts leading up to or causing or attending the injurious act in question. This rule excludes any narration that the declarant may attempt to state as to previous relations with the accused. His declarations are only admissible in so far as they explain the occurrence or fix the liability on some person. In *People v. Smith*, 172 N. Y., 242, the court in discussing the dying declarations introduced in that case, speaks of such declarations as admissible as part of the *res gestae*. It does not seem essential to the dying declarations now under discussion that they should be part of the *res gestae*. Statements of this nature to be admissible should undoubtedly explain the nature of the assault, but that they should accompany the act so closely as to be part of it would not seem to be an essential characteristic of this kind of evidence. Words which accompany and explain an act are admissible where the principal fact is admissible and no limitations are placed on them as is done in the case of dying declarations.

Another very important qualification to be noticed in this connection is that the declarant must have made the statements sought to be introduced with a realization and belief that death was inevitable. This qualification must be present, but it is not necessary that the person should really die soon after the making of the statements. *Com. v. Cooper*, 5 Allen 495. A declarant under these circumstances is as likely to tell the truth as if he were under the sanction of an oath. In fact, the fear of death supplies the office of the oath. *Tracy v. People*, 97 Ill. 106. The declarant must believe that dissolution will soon result, in order that full faith should be given his words. *State v. Welsor*, 117 Mo. 570. The trial court determines whether or not such fear exists in the mind of the declarant from all the circumstances of the case. *State v. Cronin*, 64 Conn. 293.

A few courts manifest a tendency to apply these rules very narrowly. Especially in determining whether or not the declarant fear a speedy dissolution, have they been very particular and fine distinctions drawn which do not meet the approval of many of the students of evidence. Undoubtedly in many jurisdictions, the fact that the declarant, as in the principal case, said that he didn't know what his chances for recovery were, would be enough to exclude the evidence as not being made in fear of impending death, and it would seem that a strict application of these rules was wise, as the accused is deprived of many well recognized privileges by the admission of these statements under any conditions.

#### FEDERAL PRACTICE—WAIVER OF JURISDICTION—RECOUPMENT.

The United States Supreme Court, in the recent decision in *Merchant's Heat & Light Company v. J. B. Clow & Sons*, 204 U. S. 286, adds an important contribution to the law of pleading and practice in the Federal Courts.

The suit was brought in the United States Circuit Court for the Northern District of Illinois and was based on a breach of contract

entered into between plaintiff, an Illinois corporation, and defendant, a foreign corporation, of the State of Indiana. Service was had on an independent contractor in the employ of defendant, as superintendent of construction of defendant's plant in Indiana, but, at the time of service, in Illinois for the purpose of purchasing material for the said plant.

After the suit was begun, a motion to quash the return of service, on the ground that service was not such as to give the court jurisdiction, was made, and overruled, and thereupon the defendants, after excepting, appeared, as ordered, and pleaded the general issue and also asked a recoupment of damages under the same contract, and overcharges, in excess of the amount ultimately found due to the plaintiff.

Because not necessary to the decision of the case, the court did not consider whether or not defendant corporation was doing business in the State of Illinois, within the meaning of the Illinois statute, and consequently whether properly served, this question, so the court held, being concluded by the submission to jurisdiction which was disclosed by the pleadings. However, as the correctness of its holding may be questioned, in view of the fact that there is some doubt as to whether the defendant did actually submit to the jurisdiction absolutely, it is well to determine whether the service was good *ab initio*.

In order to authorize service upon an agent of a foreign corporation found within the state, such agent must be there doing business for his corporation. *Lumberman Insurance Company v. Meyor*, 197 U. S. 407. But every transaction in the state in the way of business will not authorize service; the business done must be something in the line of that for which the corporation was organized. *St. Clair v. Cox*, 106 U. S. 350.

Ordinarily, after a special appearance for the purpose of objecting to the jurisdiction has been made, and the objection overruled, the right to insist upon this objection on appeal is not lost by a subsequent appearance and defense to the suit upon the merits. *I. Foster's Federal Practice*, 272; *Harkness v. Hyde*, 98 U. S. 476.

But in this case the court took the view that the defendant, in pleading a recoupment, deprived itself of the right to appeal; that it went beyond a mere pleading to the merits and assumed the rôle of a plaintiff; that by seeking affirmative relief, it entered, not a defense, but a cross demand; that thereby it submitted to and invoked the jurisdiction of the court and waived absolutely the objections to jurisdiction first made. The decision, therefore, seems to depend entirely upon the nature of recoupment.

Recoupment is generally considered as being of common law origin, (*I. Chitty's Pleading*, 16 Am. Ed. 595) though it is more probable that it is a pure equity doctrine derived from the civil law, (12 Ark. 699). Recoupment is the right of the defendant to claim damages sustained by him, which grew out of matters set forth in plaintiff's complaint, or which arise from plaintiff's breach of contract on which the suit is founded, or from his violation of some duty imposed by the contract; and is different from set-off in that

its claim for damages is not enforced as an independent claim or debt due the defendant, but by way of reducing or destroying plaintiff's claim. *Grisham v. Bodman*, 111 Ala. 194. The doctrine is founded upon the fundamental idea that the action puts the whole contract in issue as it ought to do, and that no party to it should be allowed to recover upon a violation of a part, while his own breach of another part goes unredressed. (30 Ga. 415.) In other words, recoupment is merely a liberal and beneficial improvement upon the doctrine of failure of consideration, the gist of the defense being that the defendant does not owe the claim sued on because, in the transaction out of which the plaintiff's supposed cause of action arose, he has suffered such damages from plaintiff's violation of his obligations or omissions of duties in the premises, as reduce or destroy plaintiff's claim; and the effect and result of the plea of recoupment being sustained is an adjudication, that, to the extent of the sum recouped the plaintiff has no claim or debt against the defendant, and a judgment for defendant upon such plea is a judgment against the existence of the claim sued on. *Grisham v. Bodman*, 111 Ala. 194.

Where common law rules of pleading are in force, the defendant is allowed to recoup his damages by way of defense only, and is permitted to do no more than reduce, or at most wholly cancel, the plaintiff's claim, and his proper course is to bring a cross action rather than to recoup if he claims that his damages are greater than the plaintiff's whole demand. (52 N. H. 215.) At common law, should the defendant recoup more than the whole demand of plaintiff, a judgment in his favor was impossible, and he was held to be concluded from bringing a subsequent suit for the residue of his claim. In order to relieve himself of such a hardship, it was optional with the defendant whether he would plead a recoupment or bring a separate action. *O'Connor v. Varney*, 10 Gray 231.

Thus it is seen that at common law a recoupment was by way of defense only and not in the nature of a cross demand. Therefore, when by statute many of the states have provided that a defendant may get a verdict and a judgment in his favor by recoupment if it appears that the plaintiff is indebted to him for a balance when the two claims are set against each other, it does not seem, in fact, to be changing the nature of recoupment but merely doing away with the rigor and harshness of the common law rule.

Arising, as it does, out of the same transaction, and differing in this respect from the statutory plea of set-off, which arises out of matter separate from and independent of the transaction under controversy, it would seem that the plea of recoupment in the principal case is a mere defense and not such a new cross claim on the part of the defendant as to constitute an absolute submission to the jurisdiction of the court, and a waiver of all right of appeal on the matter of illegality of service, which right was reserved to the defendant in pleading to the merits.

The Supreme Court, however, held the plea of recoupment to be in the nature of a cross action, and therefore, the right of appeal lost to defendant, citing however, cases involving set-off proper and not recoupments.

## RECENT CASES

APPEAL—DIVISION OF JUDGES—AFFIRMANCE.—CLARK v. WABASH RY. CO., 109 N. W. 309 (IOWA).—*Held*, that on appeal, if the State Supreme Court is equally divided, the ruling of the lower court is affirmed by operation of law.

The judgment will be affirmed or exceptions over-ruled when the Appellate Court is divided in opinion, *Etting v. United States Bank*, 24 U. S. 59; *Clark v. Kean*, 1 Del. Ch. 144; otherwise the majority opinion rules, *Beaulieu v. Furst*, 2 La. Ann. 46; and it matters not if such is reached by different reasoning. *Oakley v. Aspinwall*, 8 N. Y. Sup. 1. It follows that when the Court of Appeals is equally divided in opinion as to part of the decree appealed from, it must be affirmed as to so much; and if they concur or a majority of them concur, that there is error in the residue, so much of it must be reversed. *Commonwealth v. Beaumarchais*, 3 Call. 122 (Va.). But in the National Supreme Court, if on a constitutional question, a majority is required to pronounce a judgment, *Briscoe v. Commonwealth Bank*, 33 U. S. 118; as to jurisdiction, if equal division, the jurisdiction is sustained and the case is decided on its merits. *State v. Hays*, 30 W. Va. 107; *contra*, if in U. S. Supreme Court, *Coleman v. Hudson River Bridge Co.*, *Fed. Cas.*, No. 2983. When one judge is disqualified or cannot sit in a cause, and the other two are divided, the decision below is affirmed, *Tex. & P. Ry. Co. v. Gentry*, 13 U. S. App. 531; *contra*, no judgment can be rendered, *Bowman v. Flower*, 5 Mart. (La.) 407. But when such opinion is divided and judgment affirmed, the court are not obliged by statutes to file their opinions as in other cases, *Fraser v. Whitley*, 2 Fla. 116; nor does it settle the law, *Bridge v. Johnson*, 5 Wend. (N. Y.) 342, *Durrett v. Rucker*, 36 Ga. 272; and a bill in equity will be dismissed, *Waddle v. U. S. Bank*, 2 Ohio 336.

CONTRACTS—ABANDONMENT—PART PERFORMANCE.—CLEVELAND, C. C. & ST. L. RY. CO. v. SCOTT, 79 NORTHEASTERN, 226 (IND.).—*Held*, that a recovery may be had for a part performance of an entire contract, though there be no cause or excuse for its abandonment, if the part performed is beneficial to the defendant.

If the servant, without legal excuse, abandon the employment before full performance of an entire contract, he cannot recover anything for his services upon the contract, *Start v. Parker*, 2 Pick. 267; for under an entire contract, full performance is a condition precedent to the right of recovery thereon, *Müller v. Goddard*, 34 Me. 104; neither can he recover on an implied contract, *Laurence v. Miller*, 86 N. Y. 131; because the special contract governs the rights of the parties in respect to what has been done under it and excludes any implied contract, *Hansell v. Erickson*, 28 Ill. 257. The same applies to the contractor in the same circumstances. *Olmstead v. Beale*, 19 Pick. 528; *Peterson v. Maher*, 46 Minn. 468; *Diefenbach v. Stark*, 56 Wis. 462. Although the rule very generally prevails that one guilty of a wilful breach of an entire or special, but not general contract, is without remedy for the recovery for a part performance, yet it is not universal. The

pioneer case, *Britton v. Turner*, 6 N. H. 481, allowed a recovery upon a *quantum meruit* to the extent of benefits received, but that recovery, if any, was based at the contract price with deduction for what it would cost to procure a completion and of any damages sustained by reason of the breach and this case has since been followed by a very few states, *Pisler v. Nichols*, 8 Iowa 106; *Wheatly v. Miscal*, 5 Ind. 142; *Duncan v. Baker*, 21 Kan. 107. Those cases rested on two reasons: First, that a plaintiff should be allowed to recover, notwithstanding a wilful breach, for the reason that when he was sued by the defendant, the defendant might not be able to recover more than nominal damages, and in such a case, to refuse the plaintiff a right of action, would be to give substantial damages to the defendant. Second, that the understanding of the community, in such a case, is that a laborer shall receive compensation for the services actually rendered by him, but this understanding rests not on the contract itself but only upon the obligation imposed by law. *Parcell v. McCumber*, 11 Neb. 209; *Chambler v. Baker*, 95 N. C. 98; *Carroll v. Welch*, 26 Tex. 147.

**CONTRACTS—MASTER AND SERVANT—WRONGFUL DISCHARGE—DANIEL V. MANHATTAN LIFE INS. CO.**, 102 N. Y. SUPP. 27. A contract of employment stipulated that either party might terminate it by a notice of thirty days. Thereafter, the contract was extended for a year from a specified date. Similar renewals were subsequently made, the last renewal extending the contract for a year after a specified date. *Held*, that the master was liable for discharging the employee before the expiration of the year. *Jenks, J., dissenting.*

A new contract may abrogate an earlier one, either expressly or by implication. *Evans v. Jacobits*, 67 Kan. 249; *Sutton v. Griebel*, 118 Ia. 78. To effect discharge by implication, however, the new contract must be clearly inconsistent with the earlier contract. *Drown v. Forrest*, 63 Vt. 557; *Pease v. McQuillin*, 180 Mass. 135. If the later contract covers the same subject and has the same scope, but is wholly or partially inconsistent therewith, it abrogates the earlier contract in *toto*. *Tuggles v. Callison*, 143 Mo. 527; *Spreckel v. Bander*, 30 Or. 577. But if the subject-matter is only in part the same, the latter contract supersedes and abrogates, only in so far as it is inconsistent with the earlier one. *Alferits v. Ingalls*, 83 Fed. 964; *Bray v. Loomer*, 61 Conn. 456. A modification which merely extends the time for performance, leaves the remaining provisions in full force. *Underwood v. Wolf*, 131 Ill. 425. The minority opinion in this case is supported in *Blondel v. Le Vesconte*, 41 Minn. 35, holding that after a contract of service for no definite period had been partly performed, a subsequent written agreement fixing a definite term, embodies the terms of the prior contract.

**CORPORATIONS—TRANSFER OF ASSETS—VALIDITY AS TO CREDITORS.—WARD V. CITY TRUST CO. OF NEW YORK**, 102 N. Y. SUPP. 50. A trust company loaned money to the owners of the capital stock of a corporation, taking their note therefor, with the stock as security. Thereafter, the control of the corporation affairs was given to one of the stockholders who, in the name of the corporation, as president and general manager, indorsed a draft drawn to the order of the corporation, to the trust company who accepted this as payment of the loan and surrendered the note and stock. *Held*, that the title of the trust company to the draft could not be attacked on the ground that the payment thereof rendered the corporation insolvent, where the company

had no information, leading it to believe that the corporation was thereby made insolvent. Scott and McLaughlin, J.J., *dissenting*.

The assets of a corporation are a trust fund for the payment of its debts upon which the creditors have an equitable lien both as against stockholders and all transferees, except those purchasing in good faith for value. *Brum v. Ins. Co.*, 16 Fed. 143; *San Francisco R. R. Co. v. Bee*, 48 Cal. 398. This doctrine obtains whether a corporation is solvent or insolvent. *Union Nat. Bank v. Douglas*, 1 McCrary 86. In England, the so-called "trust fund" doctrine is not applied in respect to business corporations. *In re Wincham Shipbuilding Co.*, 9 Ch. Div. 322. But a person who pays value for negotiable paper is to be regarded as rightful holder unless he has been guilty of actual bad faith and he is not bound to make inquiries as to defects in the title thereof. *Johnson v. Way*, 27 Ohio St. 374; *Spooner v. Holmes*, 102 Mass. 503. There are minority *dicta*, however, supporting the dissenting opinion here, which hold that a corporation note, given for an individual obligation is not given in the regular course of business, but presumptively is *ultra vires* and therefore, one who takes such paper with knowledge that it is not given for a corporate purpose, can have no claim to the protection accorded a *bona fide* holder. *McLellan v. Detroit File Works*, 56 Mich. 579; *West St. Louis Savings Bank v. Shawnee County Bank*, 95 U. S. 557.

CRIMINAL LAW—FORMER JEOPARDY.—*STEINKUEHLER v. STATE*, 109 N. W. 395 (NEB.).—*Held*, that to constitute a former jeopardy, it must appear that the defendant was put upon trial before a court having competent jurisdiction upon an indictment or an information sufficient in form and substance to sustain a conviction, and that the jury was impaneled and sworn, and thus charged with his deliverance. This privilege, derived from legal guaranty, was common law, 4 *Bl. Comm.*, 335; and when declared in the American Bill of Rights, it was held that it applied only to the Federal Courts, *United State v. Gilbert*, *Fed. Cas.*, No. 15204, *Cold v. Eves*, 12 Conn. 243; but the constitutions of the several states have the same provision, *Bishop Crim. Law*, Vol. I, 650. It applies to felonies and misdemeanors, but not to actions *qui tam*; nor to civil or tort actions; nor to any action which does not make the defendant liable to be restrained from his personal liberty, *Brink v. State*, 18 Tex. App. 344; *State v. Spear*, 6 Md. 644. It may be waived by the defendant, *State v. Gurney*, 37 Maine 156. In its application, the interpretation has occasionally been, "That no man shall be tried twice for the same offence," *People v. Goodwin*, 18 Johns. 187; but "how can it mean that when there is a plain difference between a verdict given and the jeopardy of a verdict? Hazard, peril, danger, jeopardy of a verdict cannot mean a verdict given." *Commonwealth v. Cook*, 6 S. & R. 577; *Bishop Crim. Law*, Vol. I, 661; *Cobin v. The State*, 16 Ala. 781. Thus it follows that former jeopardy attaches as soon as a person has once been put upon his trial before a court of competent jurisdiction, upon an indictment or information, which is sufficient to sustain a conviction and the jury has been charged with his deliverance, and if, afterwards, for any reason, the jury are discharged unnecessarily and without his consent, he is entitled to his discharge and cannot be tried again, *Wright v. State*, 5 Ind. 290; *State v. Wallers*, 16 La. Ann. 400; *Price v. State*, 19 Ohio 423. But there can be no former jeopardy when the acquittal was obtained by fraud, *State v. Brown*, 16 Conn. 54; nor if indictment or information is defective, no matter how far trial has proceeded, *Maxwell Crim. Procedure*, 566; *Commonwealth v. Peters*, 12 Met. 387; nor

if one juror escape, *State v. Hall*, 4 Halst. 256; likewise if juryman was incompetent or not sufficiently sworn, or if the case was tried by a less than legal jury, *Brown v. The State*, 5 Eng. 607; nor if jury are discharged upon failure to agree, but *contra* if the discharge before disagreement is without defendant's consent, *United States v. Peres*, 9 Wheat. 579; nor proceedings before a grand jury, *State v. Whipple*, 57 Vt. 637; nor increased penalties for subsequent offences, *Kelley v. People*, 115 Ill. 583; nor a plea of guilty extorted by duress and judgment entered upon it, *Sanders v. State*, 4 Crim. Law Mag. 359; nor pendency of other indictments for the same charge, *Bailey v. State*, 11 Tex. App. 140.

**DIVORCE—ACTION—STATE COURT—JURISDICTION—DOMICILE.**—*STATE EX REL ALDRACH v. MORSE*, 87 PAC. 705 (UTAH).—*Held*, that where a husband and wife were married and resided in Utah, where the husband abandoned the wife, the matrimonial domicile was in that state, which was all that was essential to confer jurisdiction to decree a divorce, though the husband could not be personally served there.

This case is interesting as following the much discussed case of *Haddock v. Haddock*, 201 U. S. 562. The domicile of the husband for all practical purposes is the domicile of the wife. *Greene v. Greene*, 28 Mass. 410. But for the purpose of bringing a suit, when the husband's conduct is cause for the same, she may acquire a domicile distinct from his. *Ditson v. Ditson*, 4 R. I. 87. The desertion of the husband for a time sufficient to give the wife a cause for divorce, entitles her to sue in the former domicile of the husband. *Show v. Show*, 98 Mass. 158. So where the actual residence of the wife is in one state, but her domicile in another, an act of the husband, cause for divorce, will make the former her domicile, *Bowman v. Bowman*, 24 Ill. App. 165. By acquiring a foreign residence the wife does not lose the right to sue in the state of the husband's domicile, *Sewall v. Sewall*, 122 Mass. 156. There may be a separate domicile when the husband and wife are living apart under judicial separation, or when the husband has been guilty of misconduct. *Hunt v. Hunt*, 72 N. Y. 217; which overcomes the presumption that the domicile of the husband is that of the wife, *Harteau v. Harteau*, 14 Pick. 181; and the wife may maintain a suit in the state where they were last domiciled, *Burtis v. Burtis*, 161 Mass. 508.

**EMBEZZLEMENT—INDICTMENT—CHARACTER IN WHICH PROPERTY WAS RECEIVED—ALLEGATION—SUFFICIENCY.**—*STORMS v. STATE*, 98 S. W. 678 (ARK.).—*Held*, on a trial for embezzlement, evidence of similar transactions by accused, before and after transaction relied on, is admissible on the question of his intent.

In a prosecution of a clerk, in a Circuit Court for converting to his own use solicitor's fees in certain cases, proof of other acts of embezzlement of similar character is admissible to show guilty knowledge. *Stanley v. State*, 88 Ala. 154. In a prosecution for embezzlement previous acts of embezzlement similar to the one charged may be shown as evidence of guilty knowledge. *Same v. Neyce*, 88 Cal. 393. On a trial for embezzlement testimony as to transactions in the year following, and similar in character to those charged, are competent evidence to show guilty knowledge on the part of the defendant. *People v. DeGraff*, 6 N. Y. 412.

**EVIDENCE—OPINIONS OF NON-EXPERTS.**—*DAVIS v. SHORT LINE RY. CO.*, 88 PAC. 2 (UTAH).—*Held*, that a man's wife, who had lived with him for many years, and was in attendance on him during his illness, and was in a



condition to inform herself of his general physical condition as it was before and after he was injured, may testify to his good or poor health, and as to his suffering pains or being free from them.

A non-expert witness may give an opinion as to the general health and physical condition of another, if the facts upon which the opinion is based, are within his knowledge, and have been first stated. *Louisville, N. A. & C. v. Holsapple*, 38 N. E. 137; *Turnpike Co. v. Andrews*, 102 Ind. 138. A mother of the injured party, with whom she has been living, may testify from her observations as to what the physical condition of the party injured was, before the accident. *Sherman v. Village of Oneota*, 21 N. Y. Supp. 137. A wife may testify as to the appearance of her husband's injuries. *James v. Ford*, 9 N. Y. Supp. 504. Testimony by non-experts of the plaintiff's condition before and after the accident is admissible, such testimony being within the range of common observation; and the fact that expert witnesses have given contrary evidence is no ground for excluding it. *Winter v. Central Ia. Ry. Co.*, 45 N. W. 737.

EVIDENCE—PAROL EVIDENCE—COURT RECORDS.—*WARBURTON v. GOWRE*, 79 N. E. 270 (MASS.).—*Held*, the court record of a trial, though meager, must be taken as true, and can neither be enlarged nor diminished by parol evidence.

Parol evidence is inadmissible to vary the terms of a written instrument. 1 *Greenleaf Ev.*, Section 275. Judicial proceedings must be proved from record of court. *Lyon v. Bolling*, 14 Ala. 753. Except facts connected with the trial, which were not proper to be incorporated in the record and not inconsistent with it, may, when relevant, be proved by parol evidence. *Tobey v. Esterely Machine Co.*, 44 Am. St. Rep. 554 (N. D.). The oral testimony of a magistrate is not admissible to contradict his own record of the proceedings before him, *Henshaw v. Sanil*, 114 Mass. 74. Nor can parol evidence be given to vary decree of divorce, *Wilson v. Wilson*, 45 Cal. 399. The record of proceedings in bankruptcy, however, is only *prima facie* evidence of the facts stated in it and may be varied by parol testimony. *Tehley v. Ban*, 16 Pa. 196. A conclusive judgment in one state offered in evidence in another cannot be varied by parol testimony, *Barkman v. Hopkins*, 11 Ark. 157.

EVIDENCE—PRESUMPTIONS—COMMON LAW.—*ELLINGTON v. HARRIS*, 56 S. E. 134 (GA.).—*Held*, there being no evidence as to what was the law of South Carolina, the presumption is that the common law there prevailed.

The views upon this proposition are by no means uniform. In some states it is held that in the absence of proof, it will be presumed that the laws of another state are the same as the laws of the forum. *Osborn v. Blackburn*, 78 Wis. 209. Others hold that the law of another state will be presumed to be the same as the common law of the state of the forum. *Tillexan v. Wilson*, 43 Me. 186. Again, in the absence of evidence, some courts maintain that no presumption arises that the statute law of the forum is the same as the law of another state. *Dickey v. Bank*, 89 Md. 280. But where the law of two states has been the same, the repeal of the law in the state of the forum will not raise a presumption of its repeal in the other. *Ex parte Lafonta*, 2 Rob. 495 (La.). A court cannot presume that laws as to the distribution of intestate property in one state are the same as in another. *Leach v. Pillsbury*, 15 N. H. 137. No presumption will be made as to the law of a foreign state which would work a forfeiture. *Way v. Tele-*

*graph Co.*, 83 Ala. 542. The general rule, then, seems to be that when the courts of a state shall know as a fact, the law of a particular state, such law must be proved as a fact, and the court will not take judicial notice of it, but in the absence of proof, will presume it to be the same as the law of the forum. *R. R. v. Weaver*, 35 Kan. 412.

**INJUNCTION—BOYCOTTING.**—*ALFRED W. BOOTH & BRO. v. BURGESS, ET AL.*, 65 ATL. 226 (N. J.).—*Held*, that the manufacturer was entitled to an injunction restraining the officers of the union from directing or inducing by threats, etc., the employees of the boss carpenters to strike.

Prior to the decision of *Leathen v. Quinn*, 15 Q. B. 476, decided in 1901 the doctrine laid down in the leading English case of *Allen v. Flood*, 1 A. C. 1894, was followed both in the United States and England, viz., that it was not illegal for one person or combination to persuade a party not to enter into a contract with another, if his ability or capacity was not impugned. *Mogul Steamship Co. v. McGregor*, L. R. 15 Q. B. D. 476; *Boyson v. Thorn*, 98 Cal. 578; *Ashley v. Dison*, 48 N. Y. 430. But a conspiracy to injure a person in his profession by false statements, as to his character followed by damages is actionable. *Wilder v. McKee*, 111 Penn. St. 335. It seems to be an undisputed rule in most jurisdictions that workmen have the right to organize themselves in associations for the purpose of having their demands granted and to strike or quit work in a body upon the refusal of the employer to accede to their demands. *Arthur v. Oakes*, 11 C. C. A. 209. But to allow a business to be subjected to the control of an organization, that orders away its employees and frightens away others that it may seek to employ, is a condition utterly at war with every principal of justice. *State v. Charles T. Stewart, et al.*, 59 Vt. 273. It seems preposterous to deny an individual the right to carry on a legitimate business, as he sees fit, and the law should afford ample protection against powerful combinations using coercion and intimidating his customers. *Oxley Stave Co. v. Hopkins, et al.*, 83 Fed. 912. The procurement of workmen to quit work, who are employed upon satisfactory terms, unless the employer accedes to the demands of persons who he is under no obligation to, is illegal and constitutes a malicious and unlawful interference in the business of the employer, which is not only actionable, but a misdemeanor at common law. *Old Dominion Steamship Co. v. McKenna*, 30 Fed. 48.

**INSURANCE—ORAL APPLICATION—WAIVER.**—*GLENS FALLS INS. CO. v. MICHAEL*, 79 N. E. 905 (IND.).—*Held*, that where a standard fire policy was issued on an oral application, without any representations on the part of the assured as to the extent of his title, insurer thereby waived a clause providing for forfeiture, in case assured's interest was other than unconditional and sole ownership in fee.

A covenant in a fire policy, that the application "contains a just, full and true exposition of all the facts in regard to the condition and value of the property," is waived by an insurer who issues it solely upon a bare request. *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 136; *Bahringer v. Empire Mut. Life Ins. Co.*, 2 T. and C. (N. Y.) 610. This is upon the ground that an applicant has a right to suppose that the insurer will make proper inquiries, and that, if he does not, he waives information in regard to them. *Short v. Home Ins. Co.*, 90 N. Y. 16. But a clause in a fire insurance policy avoiding the policy if the premises are vacant for a specified period, is not waived by reason of knowledge on the part of the insurer that they are

vacant at the time the policy issued. *Queen Ins. Co. of America v. Chadwick*, 13 Tex. Civ. App. 318; *Conn. Fire Ins. Co. v. Tilley*, 88 Va. 1024. There are many *dicta* contrary to the case in point, upon the ground that where there is no written application and no terms have been agreed upon by parol, except the amount, the insured must be charged with knowledge that the policy he receives, contains the contract binding upon him. *Waller v. Northern Assur. Co.*, 10 Fed. 232; *Brown v. Commercial Fire Ins. Co.*, 86 Ala. 189; *Wierengo v. Amer. Fire Ins. Co.*, 98 Mich. 621.

LANDLORD AND TENANT—ACTION BY LANDLORD TO RECOVER POSSESSION—DEFENSES.—*WALLACE v. OCEAN GROVE CAMP MEETING ASS'N OF METHODIST EPISCOPAL CHURCH*, 148 FED. 672 (N. J.).—*Held*, a tenant, who repudiates that relation and claims title adversely to the landlord, cannot defend against an action by the landlord to recover possession on the ground of the insufficiency of the notice to terminate the lease.

Where the relation of landlord and tenant is disclaimed by the tenant, or the tenant repudiates the title of his landlord, neither a demand of possession or notice to quit is necessary to enable the landlord to maintain an action for possession of premises. *Carger v. Fee*, 40 Ind. 572; 39 N. E. 93. A landlord is not bound to give his tenant notice to quit, if the tenant has taken possession under an adverse title. *Williams v. Hensley*, 1 A. K. Marshall 181. The notice to quit to which a tenant at sufferance is entitled cannot be claimed by one who has asserted any title that directly or impliedly negatives the right to put an end to his interest. *Kunsie v. Wisom*, 39 Mich. 384. In ejectment the defense of adverse possession is inconsistent with a tenancy, and exempts plaintiff from the necessity of proving a notice to quit. *Wolf v. Holton*, 92 Mich. 136; 52 N. W. 459. A tenant at will cannot defend an action of ejectment by the landlord on the ground that he had no notice to quit, where the answer expressly denies plaintiff's title, and sets up ownership in defendant. *McCarthy v. Brown*, 113 Cal. 15.

LANDLORD AND TENANT—DEFECT IN PREMISES—INJURIES TO OCCUPANTS.—*HATCH ET AL. v. MCCLOUD RIVER LUMBER CO.*, 88 PAC. 355.—*Held*, occupants of premises under a lease assumed the risk of injury from a wire extending from an electric light pole without the premises to an anchor about two feet within the premises which was so located at the time of the lease and was known to them.

Where the occupants of a tenement house are permitted, without objection, to use the yard, and there is no restriction in the lease against such use, an easement is thereby created in favor of the tenant, and the landlord is liable for injuries resulting from his failure to make the yard safe. *Canavan v. Stayvesant*, 27 N. Y. Sup. 413. A nuisance being allowed to remain in the same position a sufficient length of time without any endeavor on the part of the defendant by the exercise of reasonable care and diligence, to ascertain its dangerous position; and having let the premises with a nuisance, existing thereupon, he is, under the circumstance, liable for injuries sustained by the tenant, *Ahern v. Steel*, 115 N. Y. 203. In an action for personal injuries, it appears that in the yard of a tenement house in which apartments were rented from defendant to plaintiff's father, a large flat stone stood almost perpendicularly against the fence, and had so stood for several months, and at the time the apartments were let; that while the plaintiff's child was playing around the stone, it fell and injured her, it was held that the defendants were

liable, though they had no actual knowledge of the existence of the stone, or its dangerous nature. *Schmidt v. Cook et al.*, 33 N. Y. Sup. 624.

**MASTER AND SERVANT—DEFECTIVE CAR—DUTY OF INSPECTION.**—*SHANKWEILER v. BALTIMORE & O. R. R. Co.*, 148 FEDERAL REPORTER 195. A railroad company is not chargeable with negligence which will render it liable for an injury to an employee caused by the breaking of a defective brake-rod, where the defect was latent and in a place where it was not discoverable by such an inspection as is customarily made by well-regulated and prudently conducted railroads, which inspection was made and was the only kind which was practicable, or which could be made without seriously interfering with the operation of trains.

It is the duty of defendant railroad company, receiving a freight car from another company, to inspect it, and to see that it is reasonably fit for service; and, in the event that a freight car is received with a brake-beam in such a defective condition that defendant's brakeman, whose duty it is to couple the foreign car with those of defendant, and is injured in his attempt to make such coupling, and the brakeman has no knowledge of the condition of the brake-beam, and its condition cannot be readily seen, defendant is liable for such injury. *Missouri Pacific Railway Company v. Barber*, 44 Kan. 612, 24 Pac. 969.

**MASTER AND SERVANT—INJURY TO SERVANT—VICE PRINCIPAL—TIVNAN v. KEAHON**, 101 N. Y. SUPP. 1076. Houghton and Scott, J.J., *dissenting*.

*Held*.—One through whom the proprietor of a livery stable conducted it, and who is the manager and superintendent thereof, and employs help, is the vice-principal of the master, for whose negligence in failing to instruct a common laborer how to start an engine, great danger being attendant thereon unless it was started properly, the master is liable.

A foreman in a mine, whose duty it was to direct ten or twelve men what work to do, and take care of mine, but who is subject to the orders of the pit boss and the superintendent, is the fellow servant and not vice-principal of a laborer under his control, who is injured while assisting the foreman in the execution of his work. *What Cheer Coal Co. v. Johnson*, 56 Fed. 810; *Railroad Co. v. Baugh*, 13 Sup. Ct. 914. A section boss having charge of keeping track in order, who hired and discharged his men, but who was subject to the orders and directions of a track master, to whom it was his duty to report needed repairs, and to receive from him the necessary tools and materials, was a fellow servant of a section hand injured from the defective condition of a hand car, the defects in which were known to such section boss, and were suffered to exist through his negligence. *Barringer v. Delaware & H. Canal Co.*, 19 Hun. 216. In an action to recover for injuries sustained while unloading dirt under a foreman who was in charge of the men, that he was not a vice-principal, but fellow servant, although he had power to discharge for cause. *Schroeder v. Flint and P. M. R. Co.*, 103 Mich. 213; 61 N. W. 663.

**NEGLIGENCE—DANGEROUS PREMISES—CARE REQUIRED.**—*GILFALLAN v. GERMAN HOSPITAL & DISPENSARY IN THE CITY OF NEW YORK*, 100 N. Y. SUPP. 601. The intestate, employed as plumber by the defendant, attempted to leave the defendant's premises by means of a ladder and wall, although the premises were provided with a safe entrance and exit. After climbing to the top of the wall and as he stepped out on what he supposed to be the roof of an ash-lift, he fell into a well sustaining fatal injuries. *Held*, that as

the intestate had never been authorized to use this means of exit from the hospital grounds, the defendant owed him no duty to keep the same safe for that purpose. *Hooker, J., dissenting.*

The basis of liability in negligence cases is the violation of some legal duty to exercise care. *Cusick v. Adams*, 115 N. Y. 55. Such duty must be owed to the plaintiff or the action will not lie. *Nickerson v. Bridgeport H. Co.*, 46 Conn. 24; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19. The general rule is that a landowner is under no obligation to render his premises safe for any purpose for which he cannot reasonably anticipate that they will be used. *Armstrong v. Medbury*, 67 Mich. 250. A mere license given by the owners to enter and use the premises, which the licensee has full opportunity of inspecting and which contain no concealed cause of mischief, throws no obligation upon the owner to guard the licensee against danger. *Sullway v. Waters*, 14 Ir. C. L. 460. If plaintiff is a licensee and falls into a hole, which is not concealed except by the darkness of night, the owner of the premises is not liable for injuries sustained thereby. *Reardon v. Thompson*, 149 Mass. 267.

NEGLIGENCE—EVIDENCE TO ESTABLISH.—*LEONARD V. MIAMI MIN. CO.*, 148 FED. REP. 827.—*Held*, that an inference of negligence cannot be based on a presumption nor on speculation and conjecture.

General rule is that negligence cannot be presumed without any evidence, *Lyndsay v. Conn. & P. R. R. Co.*, 27 Vt. 643; *Daniel v. Directors, etc., Met. R. Co.*, L. R. (5 H. L.) 45. And as law does not impute it, it lies on party alleging it to prove it, *Doyle v. Boston & A. R. R. Co.*, 145 Mass. 386; *O'Connor v. Mo. Pac. R. R. Co.*, 94 Mo. 150. Mere fact of an accident's happening does not amount to evidence sufficient to base an inference of negligence on, *Welfare v. London & B. R. Co.*, L. R. (4 Q. B.) 698. To the general rule as just stated there are two well recognized exceptions, the first being: when relation of carrier and passenger exists and injury occurs during actual transportation, *Curtis v. Rochester, etc., R. Co.*, 18 N. Y. 534. But besides these two elements the plaintiff must show that the accident was caused by some defect in road or some part of the apparatus employed in operating it, *Wall v. Livesay*, 6 Col. 465; *Christie v. Griggs*, 2 Campbell's Rep. 79. The second exception being: when an injury arises from some condition or event which is in its very nature so obviously destructive of safety of person or property as to admit of no other inference save negligence on part of person in control of such agency, such acts come within the principle of *res ipsa loquitur*, *Kearney v. London & B. R. Co.*, L. R. (6 Q. B.) 761; *Mullen v. St. John*, 57 N. Y. 567.

PATENTS—INFRINGEMENT—EQUIVALENTS.—*UNIVERSAL BRUSH CO. V. SONN, ET AL.*, 146 FED. 517 (N. Y.).—*Held*, that the substantial equivalent of a patented device or means which performs the same function does not avoid an infringement because it may perform an additional function.

The courts and text writers are very reluctant about defining the term invention, lest it should breed injustice. However, it must be new, useful and comply with all legal formalities. *Cooley on Torts*, second edition, page 414. Novelty is presumed on the grant of a patent, and the patent is *prima facie* evidence thereof. *Waterbury Brass Co. v. N. Y., etc., Brass Co.*, 3 Fish. Pat. Cas. 43; *Huber v. Nelson Mfg. Co.*, 30 Fed. 830. Whether a device is new, however, depends upon whether it is the same kind as another or whether it acts in the same way and produces the same result in substance.

*Howe Mach. Co. v. Nail Needle Co.*, 134 U. S. 388; *Day v. Fair Haven Ry. Co.*, 132 U. S. 98. To be raised to the dignity of an invention, the improvement must be one which would not ordinarily occur to an expert mechanic. *Mast, Foos & Co. v. Stove Mfg. Co.*, 177 U. S. 493; *Potts v. Creager*, 155 U. S. 597. So also the aggregation or combination of old elements, which perform no new function and accomplishes no new results, does not involve a patentable novelty. *Mosler Safe Co. v. Mosler*, 127 U. S. 364; *Peters v. Hanson*, 129 U. S. 541. Yet if such a new combination of known elements produces a new and beneficial result, it is evidence of invention but not conclusive. *Loom Co. v. Higgins*, 105 U. S. 580. Moreover, the use of an old thing for a new purpose does not constitute an invention unless it produces a new and useful result. *Grant v. Walter*, 148 U. S. 547; *Knapp v. Morss*, 150 U. S. 221. Nor is a device any less an equivalent of another because it may perform an additional function, *O'Leary v. Utica & M. V. Ry. Co.*, 144 Fed. 399; *Wheeler v. Climber, Mower, etc., Co.*, Fed. Cas. No. 17,493. One of the best tests of invention, also, is whether it brings to actual commercial success what prior inventors had partly accomplished. *Consolidated Valve Co. v. Crosby Valve Co.*, 113 U. S. 157; *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 686. And although prior unsuccessful experiments involved the same idea or principle as a subsequent patent, the latter will not be invalidated. *Whitelys v. Swayne*, 7 Wall. 685; *Am. Bell Telep. Co. v. People Tel. Co.*, 25 Fed. 725.

**SLANDER—EVIDENCE—UNDERSTANDING OF WORDS SPOKEN.**—*PROCTER v. POINTER*, 56 S. E. 111 (GA.).—*Held*, that in cases of slander, an exception is sometimes made to the general rule that witnesses must state facts, and not their inferences from them and as the slander and damage consist in the apprehension of the hearers, they are allowed to give their understanding of the words spoken.

The general rule is that witnesses may state their understanding of slanderous words proved to have been spoken. *Tottlebein v. Blankenship*, 88 Ill. App. 47; *Freeman v. Sanderson*, 123 Ind. 264. But a contrary view has occasionally been taken. *Snell v. Snow*, 54 Mass. 278; *Wright v. Paige*, 36 Barb. (N. Y.) 438. So where a slander was made by insinuations and gestures, it was competent for hearers to state what they understood by them. *Leonard v. Allen*, 65 Mass. 241. Custom may give to words an uncommon meaning and a witness may be allowed to give his understanding of them. *Newbold v. Bradstreet*, 57 Md. 38. But where words are unambiguous and expressed in ordinary language, a witness will not be allowed to testify as to his understanding. *Jarnigan v. Fleming*, 43 Miss. 710. Hence, the converse also is true, that evidence as to understanding of witness will only be admitted where the words are ambiguous and susceptible of different meanings. *Show v. Show*, 49 N. H. 533.

**STATE REGULATION—POLICE POWER—CITY ORDINANCE—CITY OF SELMA v. TILL**, 42 So. 405 (ALA.).—*Held*, that a city ordinance, making it an offense for one to peddle without having secured a license was not repugnant to the Interstate Law nor any other feature of the State or Federal Constitution.

Any state has the right, by virtue of its police power, to tax or forbid any class of employment which may be prejudicial to the public good *Cooley on Const. Limitations*, sixth edition, 742; *Sayre v. Phillips*, 148 Pa. St. 482. This police power is inherent in a state without any reservation in the Constitution. *Carthage v. Frederick*, 122 N. Y. 268; *Com. v. Vrooman*,

164 Pa. St. 306. It must be distinguished from eminent domain or taxing power. *Carthage v. Rhodes*, 101 Mo. 175; *N. Y. Health Dep't. v. Trinity Church*, 145 N. Y. 32. Although police power is exercised only for the purpose of promoting the public welfare, yet the object must always be regulation and not the raising of revenue. *Walker v. Jameson*, 140 Ind. 591; *Muhlenbrinck v. Long Branch Com'rs*, 42 N. J. L. 364. Moreover, in the absence of any constitutional restriction it may be delegated to the various municipalities throughout the state. *N. Y. Fire Dep't v. Gilmour*, 140 N. Y. 453; *Com. v. Plaisted*, 148 Mass. 375. But such city ordinance must not be a regulation of interstate commerce nor discriminate between residents or products of different states. *Welton v. Mo.* 91 U. S. 275; *Robbins v. Shelby Co. Tasing Dist.* 120 U. S. 498. Hence, sellers by sample for future delivery are not regarded, in this country, as peddlers, under such a city ordinance. *Stanford v. Fisher*, 140 N. Y. 187; *Com. v. Farnum*, 114 Mass. 267. And one imposing a license on peddling of patent rights would be unconstitutional and void. *In re Sheffield*, 64 Fed. 836. So, also, such an ordinance must not deny anyone, such as a foreigner, within the jurisdiction of that state, the equal protection of its laws. *State v. Montgomery*, 94 Me. 192; *County of Santa Clara v. So. Pac. Ry. Co.*, 118 U. S. 396.

STREET RAILROADS—COLLISION WITH TEAM—EVIDENCE.—*BAICKER v. PEOPLE'S ST. RY. CO. OF NANTICOKE & NEWPORT*, 64 ATL., 675 PA.—A collision occurred between a street car and the plaintiff's wagon, the evidence showing that if plaintiff had continued on his course, he could have cleared the track and avoided the collision, but that having changed his mind, he attempted to back off. Both the motorman and the plaintiff acted on the belief that he would succeed. *Held*, that he could not recover for the injuries received. *Mestreizat, J., dissenting.*

Persons engaged in operating street cars are not required to use more than ordinary care to see that the track is clear to avoid collisions with vehicles. *St. Antonio St. Ry. Co. v. Mechler*, 87 Tex. 628. Where a person drives in front of an electric car and is struck by it, while attempting to get off the track, the street railway is not liable where there was no evidence that the speed was dangerous or that the gong was not sounded. *Guillos v. Fort Wayne & B. I. Ry. Co.*, 108 Mich. 41. The dissenting opinion is in accordance with the decisions laid down in several jurisdictions. Since street railroads have no superior right of way over vehicles at public crossings, the company will be liable for negligence in its employees, in failing to have the car under control at such places. *Watson v. Minneapolis St. R. Co.*, 53 Minn. 551; *Hickman v. Union Depot R. Co.*, 47 Mo. App. 65. Although the peril may have been increased by an attempt to avoid it, the street railway is liable, if the driver was placed in peril by the negligence of the conductor and injury occurred while the teamster was exercising ordinary care. *Gibbons v. Wilkesbarre & S. St. Ry. Co.*, 155 Pa. 279.

USURY—ASSUMPTION OF USURIOUS DEBT.—*STUCKEY v. MIDDLE STATES LOAN BLDG. & CONST. CO.*, 55 S. E. 996 (W. VA.).—*Held*, that one who purchases land which is subject to an usurious debt and assumes payment of such debt, as part of the consideration cannot be relieved from the usury.

Whether the right to take advantage of the different statutes of usury is a personal or vested one is apparently a much mooted question in the various jurisdictions of this country. Some courts give the assignee of an usurious trust obligation the same rights of defense, as that of assignor at the

time of the assignment. *Tamplin v. Wentworth*, 99 Mass. 63; *Woolfolk v. Plant*, 46 Ga. 422. These decisions are consistent with the general rule, that an assignee takes an assignment subject to all the equities of the debtor existing at the time he received notice of the assignment. *Callanan v. Edwards*, 32 N. Y. 483; *Buckner v. Smith*, 1 Wash. (Va.) 296. Courts maintaining otherwise, hold that a person assuming payment of an usurious loan does so, as part of the consideration, and that it is a personal right of the assignor, and the assignee is precluded from setting up usury as a defense. *Smith v. McMillan*, 46 W. Va. 577; *Sands v. Church*, 6 N. Y. 347. Improbably all jurisdictions, an execution creditor and a purchaser of an equity of redemption are allowed to plead usury in the inception of the contract as a defense, *Bank v. Warehouse*, 49 N. Y. 642.



## REVIEWS

*Outlines of Criminal Law.* By Courtney Stanhope Kenney, LL.D., Reader in English Law, University of Cambridge. Revised and Adapted for American Scholars by James H. Webb, Instructor in Criminal Law and Procedure in the Law Department of Yale University. N. Y. The MacMillan Co., 1907.

Until the publication of this volume, there has been no short work on Criminal Law especially adapted to the use of American law students. Dr. Kenney's book, published in 1902, was based upon lectures given by him for more than twenty years at Cambridge. It stated, in a fresh and interesting way, so much of English criminal law as an English university student or an English country magistrate needs to know, in order to acquaint himself with its fundamental principles and rules, not forgetting to emphasize such as are of universal application. Like all English law books, it was saturated with statute law. Mr. Webb has weeded out a good deal of this, introduced not a little from purely American sources, and recast the work into a homogeneous whole, not showing upon its face how much is from his pen and how much from that of Dr. Kenney. The latter observes of Stephen's edition of Blackstone (p. 4) that it was one in which the Commentaries were reconstructed rather than edited. A not dissimilar service has been performed, and well performed for him by Mr. Webb.

The English common law of crime was the parent of ours, but we have somewhat expanded it in applying it to the conditions of a new country, provided in the beginning with but meager statute-books. Thus Dr. Kenney's remark (pp. 6, 23) that until made such by Act of Parliament, it was no crime in England to kill a horse or cow, represents a stage of social development which Americans passed very early in their judicial history.

The peculiar value of the original work was its clear setting forth of the subject in a scholarly and philosophic way. This feature has been fully preserved in Mr. Webb's recension. It is an intelligible book to the general reader, who has had no professional education in law.

Dr. Kenney is no sentimentalist in his theory of punishments. He vindicates them mainly as deterrent, although showing some sympathy (p. 30) with Cousin's epigram that punishment is not just because it deters, but deters because it is felt to be just.

One gets occasionally an illuminating glimpse of the greater directness and stronger movement of the English criminal trial, as compared with ours. The Judge takes a hand in the case, from the start to the finish, in a way that our Constitutions or usages render rare. Thus a trial is cited as occurring in 1901, when Mr. Justice Bigham "advised" the jury to acquit a woman of murder, who had deliberately drowned two of her children, though she had never showed any other symptom of a disordered

mind, and had declared that she thought "it was the best thing she could do for them." (p. 51).

The chapters on evidence are of particular merit. Our very artificial rules and the reasons for them are both clearly explained.

Dr. Kenney accepts as a maxim *Omnia presumuntur rite et solenniter esse acta*, without the customary prefix of *Ex diuturnitate temporis* (p. 319). It may be doubted if in this abbreviated form it can be considered as established in American courts.

It has evidently been the aim of Mr. Webb to make no changes in the text not necessary to prevent misconceptions by an American reader. This rule was, no doubt, the right one, but occasionally may have been pushed too far. Thus, he has retained without qualification (p. 360) the statement (supported by ample English authority) that a witness, who is not a party, cannot be compelled to produce his title-deeds for inspection. There are, to say the least, strong reasons for the position that this immunity is bound up with the peculiar English system of real estate conveyancing, and would not be respected in a country where all land titles are normally matters of public record.

The proof reading has been in general well done, though we notice (pp. xvii, 306) the leading case of United States v. Arjona given as United States v. Arizona.

S. E. B.

*Aperçu de l'Evolution Juridique du Mariage. II. Espagne.* By Emile Stocquart. Brussels, Oscar Lamberty, 1907. pp. 283. 3½ francs.

The first part of this work was reviewed in the Yale Law Journal in 1905 (Vol. XIV, 357). The author now takes up the course of the law of marriage in Spain. Its original Roman foundation is first set out, with considerable detail;—monogamy but side by side with it, concubinage, both equally legitimate forms of union. The father of the concubine, or he who had the *patria potestas* over her, must give his consent to the latter contract, and by the same right could terminate it at will (pp. 39, 65). Christianity, under Constantine, withdrew the sanction of the law for concubinage (p. 73).

The invasion of the Goths made, Dr. Stocquart maintains, less of economic and social changes than has often been thought, because the lands which they seized belonged to but a few proprietors. Spain was then held by a handful of grandees, each with a little army of slaves. One of them fed four thousand persons through the Winter on the products of his estate. The Barbarians took from most of these land holders two-thirds of their possessions; but this still left them rich (p. 99). In the fifth century the term *nobles* meant the rich rather than the well-born, and they were found largely in the cities, where the principles of civil liberty were for long better enforced than in the rest of Europe.

German institutions had little influence in Spain. The name *German* is the Latin rendering of *Herman*, that is war-man (p. 108), and it was only in that character that the Roman people

knew the German people. In the seventh century, the Roman and Barbarian laws were merged into one system by the Visigoths and the territoriality of law made the rule (p. 217). Restrictions on marriage now became greater. Theodosius had made it a capital crime for first cousins to marry. Now the marriage of the children of first cousins was forbidden (p. 222).

A new influence soon came in with the Arabs. The Koran ranged itself with the old Roman law in allowing divorce at the will of the husband (p. 264). But the Moor in Spain was ready to acknowledge woman's share in the world's work, outside of the household. Many were government clerks. In one quarter of Cordova there were seventy girls employed as copyists (p. 265). After the final expulsion or subjugation of the Moors, those who remained were governed by their own personal law, as regards marriage (p. 278).

All Spanish institutions of government and society, down to their bull-fights, and including their spirit of architecture, bore and still bear a closer resemblance to what belonged to Rome, than those of the rest of modern Europe. There was, however, a strong local color in the various provinces, and a diverse customary law (the *Fueros*), the treatment of which Dr. Stocquart reserves for another volume, in which he will also trace the Spanish history of marriage to the present time, with its growing conflict between Church and State.

Like its predecessor, this volume is the work of a ready writer of wide reading, who has the art of stating plainly and in good order what others of perhaps greater scholarship but inferior literary ability have left in a certain degree of obscurity or confusion.

S. E. B.

*Federal Rate Bill, Immunity Act and Negligence Law of 1906.*

Annotated by F. N. Judson. T. H. Flood & Co., Chicago. *Conference of Counsel for Railroad Companies in Louisville. Ky., Sept., 1906.* Report of Committee on Employers' Liability Act.

By passing the Rate Bill, the Immunity Act and the Negligence Law in the Fifty-ninth Congress, the Federal Government greatly extended the scope of its control over corporations engaged in interstate commerce and abrogated some of the fundamental principles of the common law. Whether or not these acts will stand the test to which they will undoubtedly be put by the corporations which are affected by these statutes is a matter of great interest and of some doubt.

At the present time the Employers' Liability Act, or "Federal Negligence Law" as it is sometimes called, seems to create more excitement in the camp of the railroad corporations than either the Rate Bill or the Immunity Act. The Immunity Act simply declares in statutory form the principle enunciated by the court in *U. S. v. Armour*, 142 Fed. 808, to the effect that immunity from prosecution granted in cases in which self incriminating evidence is produced before the Interstate Commerce Commission

extends "only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence documentary or otherwise, under oath." In other words, the Act does not include in its scope the corporation or artificial person. The salutary effect of this provision is obvious. The Commission is enabled to secure evidence, otherwise unobtainable, and at the same time the guilty party does not escape all punishment. The immunity is extended to the agents and officers of the corporation, but not to the artificial entity itself. One would not expect this matter to create the same amount of interest which the more radical Negligence Law has aroused.

Bitter and harsh have been the assaults on this piece of legislation. Some foresee the destruction of our dual system of government, while others see an opportunity to give a crushing blow to the overzealous supporters of increased federal control of interstate commerce. What the outcome will be is doubtful. Already two federal courts have declared that the act is unconstitutional. Judge Evans of the District Court of Kentucky and Judge McCall of the District Court of Tennessee have decided that Congress in undertaking to legislate in this manner, has transgressed the limits of its powers.

Judge McCall declared in substance that "Congress has no power to define the liability of interstate carriers for torts resulting in injury to their employees unless it has, in the first instance, prescribed rules governing the conduct of such carriers towards their employees, and it is only for a breach of those rules that it may fix civil liability."

"As the Employers' Liability Act does not prescribe rules governing the conduct of common carriers towards their employees, but merely attempts to define their liability for negligence, it is not a regulation of commerce among the states, and therefore, is unconstitutional."

"If the Act regulates commerce at all, it regulates intrastate commerce, and as Congress has no power to regulate intrastate commerce the entire Act must be declared void, it being impossible to separate that part of the act which relates to intrastate commerce from that part which relates to interstate commerce."

Practically the same grounds are taken by Judge Evans in the earlier case and they are the grounds upon which the opponents of the act rely in their attacks. Just what view the United States Supreme Court will take of the matter is, of course, unknown. The decision will probably be handed down sometime in April.

Some of the interesting features of the Negligence Law are as follows:

The strict common law doctrine of contributory negligence is abrogated, and the rule adopted is substantially the same as that which exists in admiralty. The statute provides that "contributory negligence shall not bar a recovery where his (employee's) contributory negligence was slight, and that of the employer was gross in comparison." This rule does not entirely

relieve the injured party who contributes to the cause of his injury from all liability. Yet the strict and rigid rule which bars a recovery at common law where the injured party is guilty of contributory negligence is no longer in force in this class of cases in the Federal Courts.

The above brings us to a consideration of another and no less interesting feature of the act, that the doctrine of comparative negligence is adopted. The statute provides that "the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." This doctrine is not a part of the common law and is generally considered a dangerous one. While the principle of equitable adjustment which the rule contains is unquestionably praiseworthy, it is most pernicious in practice. The act provides that "all questions of negligence shall be for the jury." To turn a jury loose on questions involving such nicety and precision invites havoc and seriously impairs the usefulness of the jury system.

It is one thing to determine whether or not a party has departed from the legal standard of care required of him and quite another and most difficult thing to find the degree of departure by each party, to determine whether the defendant is guilty of gross negligence and the plaintiff of slight negligence. The mere difficulty of administering a rule is, perhaps, never a sufficient excuse for not adopting it, if it is a just one; but where that difficulty renders the rule impracticable, any other excuse is uncalled for. The Supreme Court of Illinois clearly stated this view when it said that "the definition of gross negligence itself proves that it is not intended to be the subject of comparison. It is 'the wont of slight diligence.' Slight negligence is 'the wont of great diligence.'"

The fellow servant rule is also abrogated. The corporations coming within the purview of the act are liable to any of their employees for all damages resulting from the negligence of any officer, agent or employee. This is not the place to discuss the merits of the fellow servant doctrine. It is sufficient to note the effect of the provision.

The texts of these acts annotated by F. N. Judson and the report of the committee appointed at the Conference of Counsel for Railroad Companies on the questions arising under the Employers' Liability Act are of great value to the student of these new laws. The latter work is very exhaustive and presents in the strongest light the position which the railroads have assumed in combating the extension of federal control over interstate commerce.

## SCHOOL AND ALUMNI NOTES.

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The following self-explanatory circular letter will be of interest to the alumni and students of the Yale Law School:

NEW YORK, Feb. 15, 1907.

An informal committee of Yale graduates, consisting of the undersigned, all practicing lawyers in New York City, has formulated and set on foot a plan to assist graduates of Yale, of whatever law school, to obtain proper positions in New York law offices. This, in the judgment of the committee, is an important work, not only for the law students and clerks, but for the bar of the city. It is especially important for young lawyers to get into good offices, for their clerkships often make or mar their careers. The committee proposes to send notices of its plan to all Yale men practicing law in the city of New York, inviting them to co-operate by advising the secretary of any vacancies in their offices, and notices will be sent to the Yale Law School and to the University, inviting all who intend to practice law in New York City and who desire clerkships, to advise the secretary of the committee and the proper papers will be forwarded them upon which to make application. The fullest possible information concerning each candidate will be given to the law office applying for his services. No charge of any kind will be made to the applicants and all expenses will be borne by the committee.

The effort of the committee will be to put the right man in the right place, but no recommendation will be made by the committee, it simply undertaking to bring the parties together and allow them to conclude their own business arrangements.

A somewhat similar plan has been in operation for some time past for the benefit of Harvard graduates and it has been developed most successfully. The authorities of the Yale Law School and of the University have promised their cordial co-operation to the committee. Further particulars will be sent at a later date.

ROBERT W. DEFOREST, '70,  
FREDERICK TREVOR HILL, '87,  
CHARLES P. HOWLAND, '91,  
ROGER S. BALDWIN, '95,  
THOMAS D. THACHER, '71.

The recent elections of the Class of 1907 resulted as follows: President, George Elton Parks; Vice-President, Gaylord Bacon Van Kirk; Secretary and Treasurer, Charles William Evarts; Editor of Yale Shingle, Joseph Marion Forsyth; Business Manager of Yale Shingle, Michael Vincent Blansfield. Class Day Committee: Howard, chairman, G. S. Munson, Kirkland, Johns, Fox, McEvoy, Slade. Picture Committee: Jefferson, chairman, Lovelace, Dunn, Snow, Brown. Cap and Gown Committee: Stinson, chairman, Hopwood, Van Schaick, DeSopo, Jennings.

The final debating team representing the University which met Princeton on March 22nd in Woolsey Hall was composed of the following men: Rogers Benton Hull, '07, Greenfield, Mass.; Robert Ralph Lockwood, '07, Zelienople, Pa.; Saul Berman, '08 L., Hartford, Conn. Alternates for the debate were: Walter P. Armstrong, '08 L., Coffeerville, Miss.; E. H. Rsiener, '08, McConnellsburg, Pa. and P. R. Stinson, '07 L., Rutland, Vt.

The preliminaries for the Wayland Prize Debate, under the auspices of the Yale Kent Club, held recently, resulted in the qualification for the final debate for the following men: Cosgrove, P. G., Musgrave, P. G., O'Hara, '08, DeSopo, '07, Whitman, '07 and Jones, '09.

The following members of the Wayland Club have qualified to speak at the final debate to be held in Hendrie Hall, April 19th, for the Munson prizes: Smith, '07, Armstrong, '08, Harmon, '08, Jamison, '08, McKenna, '08 and Malloy, '08.

Dean Rogers resumed his class-room work Monday, March 11th, after an absence of three months. Dr. Rogers' serious illness was a source of great alarm to the faculty and student body of the Law School. All rejoice at his regaining of health and his return to school work.

'77—James H. Webb was recently reappointed a member of the board of control of the state agricultural experiment station by Governor Woodruff of Connecticut.

Mr. Webb's edition of Kenny's *Outlines of Criminal Law* was recently published and is now being used in the course of instruction in Criminal Law in the Law School.

'87—Judge Isaac Wolfe, recently appointed to the branch of the Court of Common Pleas for the district of New Haven, assumed his official duties February 15th.

'88—Mr C. D. Rinehart's address is Jacksonville, Fla., where he is associated with Ezra P. Aktell in the general practice of law.

'89—E. C. Buckland has been relieved of his legal work for the New York, New Haven and Hartford Railroad at New Haven and is now settled permanently at Providence, R. I., as vice-president of that system.

'92—Lewis S. Haslam is general counsel for the Simmons Hardware Company, with offices at St. Louis, Mo.

'93—Rollin U. Tyler, is engaged in the general practice of law at Tylerville, Conn.

'93—James S. McCall is engaged in the general practice of law at York, Pa. Mr. McCall was recently elected Mayor of the city of York.

'94—Harold R. Durant had a story, "A Colonial Maid," in *Woman*, for February, which has received very favorable mention from the critics.

'95—Herbert Knox Smith, formerly Deputy Commissioner of Bureau of Corporations at Washington, was on March 5th sworn in as Commissioner of that Bureau. Mr. Smith has been recently named by the President as one of a committee of five to investigate the water-ways of the United States, with particular reference to the Mississippi Valley.

'95—Frank E. Donnelly has just formed a law partnership with James G. Sanderson, under the firm name of Donnelly and Sanderson, with offices in the Mears Building, Scranton, Pa.

'97—Herbert Seymore Darlington of Philadelphia was married on February 23rd to Miss Sibyl Hubbard, daughter of General and Mrs. Thomas Hubbard of New York City.

'00—Cornelius P. Kitchel has resigned his position as Chief Attorney of the New York Legal Aid Society after two years of service and has opened an office at 135 Broadway, New York City, for the general practice of law.

'01—Charles P. Hine is at present Second Assistant Attorney General of the State of Ohio, with offices at Columbus, but expects soon to return to Cleveland, where he will engage in active practice.

'03—A daughter was born on February 17th to Mr. and Mrs. Henry J. Black of New York City.

'03—George W. Crawford, who has been clerk of the Probate Court for New Haven for the past four years, recently retired from that office, and is now engaged in the practice of law with offices at 42 Church Street, New Haven.

'03—George Whittlesey is with the law firm of Dexter, Osborn and Fleming, 71 Broadway, New York.

'06—Birdsey Erskine Case has published in booklet form *The International Power of the United States on the American Continent*, the Townsend Prize Essay which he delivered at the Law School Commencement last June.



## ACKNOWLEDGMENTS

WHARTON ON HOMICIDE. Third Edition. By Frank H. Bowlby. Lawyers Co-op., Rochester, N. Y. Law canvas, pp. CLVI-1-1120. *Review will follow.*

REPORT OF COLORADO BAR ASSOCIATION FOR 1906.

PRINCIPLES OF GERMAN CIVIL CODE. Ernest J. Schuster, LL.D., (Munich), of Lincoln's Inn, Barrister at Law. Oxford University Press, New York. Cloth, pp. XLV-1-684. *Review will follow.*

REMSEN ON THE PREPARATION AND CONTEST OF WILLS. By Daniel S. Remsen, of the N. Y. Bar. Baker, Voorhis & Co. Law Canvas, pp. 880. Price \$6.00. *Review will follow.*

PROCEEDINGS OF NATIONAL CONGRESS ON UNIFORM DIVORCE LAWS AND REPORT OF ADJOURNED MEETING, REPORT OF PENN. COM. ON DIVORCE, ADDRESS FROM NATIONAL CONGRESS ON UNIFORM DIVORCE LAWS. Receipt acknowledged to Wm. Crocker, Williamsport, Pa.

OUTLINES OF CRIMINAL LAW. By Courtney Stanhope Kenney, LL.D. Revised and adapted for American Scholars by James H. Webb, Instructor in Criminal Law and Procedure at Yale Law School. McMillan Co., New York. Cloth, XXI-1-387-404. *Review in this issue.*

REPORT OF COMMISSION APPOINTED AT THE "CONFERENCE OF COUNCIL FOR R. R. COMPANIES" in Louisville, Ky., on September 26-27, 1906, on questions under Employer's Liability Act.

INDEX-DIGEST OF THE INTERSTATE COMMERCE ACTS. Little, Brown & Co. 254 Washington St., Boston, Mass.

REPORT OF 29TH ANNUAL MEETING OF AMERICAN BAR ASSO. "APERÇU DE L'EVOLUTION JURIDIQUE DU MARIAGE II. ESPAGNE." By Émile Stocquart, Brussels, Oscar Lamberty. 1907. pp. 283. 3¼ francs. *Review in this issue.*

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## THE FRENCH BAR.

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A few pages concerning the French Bar may not be unwelcome to the readers of the *Journal*. The history of the institution, at once venerable and virile, and of its influence upon legislation and jurisprudence, upon public opinion and national policy is replete with interest, and with lessons and worthy example to the profession in every country. The utmost that the writer of a brief article on so large a subject can hope for, is so to touch upon it that those who read will desire to know more and initiate further researches of their own.

The Bar in France is organized into what is known as the Order of Barristers (*Ordre des Avocats*). The union of its members was purely voluntary and due to their own initiative, for the purposes of mutual aid and encouragement. This resulted in the gradual formation of a body whose existence could not be ignored and whose solidarity secured to its action an influence universally acknowledged, so that in time its entity was recognized by the laws of the State and important rights and privileges were conceded to it. From early days the institution avoided and disclaimed the character of a guild or corporation acting under governmental license or sanction and Chancellor D'Aguesseau declared that Barristers did not constitute a body or corporation in the proper sense of those terms. They are held together, he said, solely by the exercise of a common duty; they are separate individuals severally devoted to the defense of litigants, rather than members of one body in the precise meaning of that term,—a Profession, or Order, is the word best expressing the status or situation of the Barristers. If there be a sort of discipline established among them, for the honor and repute of the

Order, it is rather the result of voluntary agreement than the work of public authority.

In France, from the earliest times, the Germanic principle prevailed which required that all litigants should appear in person to present their claims, but ignorant or unskilful pleaders were permitted the aid of a defender to speak for them, and the judge even appointed such a defender for widows, minors and paupers. This system was recognized as early as the Merovingians. Persons so aiding were not, however, designated as "*advocatus*"—but only as "*defensores*," "*clamatores*," and the term "*advocatus*" was reserved for the representatives of those privileged ones who were exempted from personal appearance, and whose representation included the preparation of the pleadings or other judicial instruments, as well as the oral presentation of the case, thus cumulating the office of Solicitor and Barrister—or "*avocat* and *avoué*."

The *avocat* or barrister is he who has the right to appear before Courts of Justice and plead for the rights of others.

The *avoué* or solicitor (until the Revolution, known as a "*procureur*") is he to whom is entrusted the initiation of judicial proceedings, and the preparation of such judicial writings as are required and is recognized as the direct representative of the parties in interest before the courts.

Under the influence of the rigid formalism of the feudal jurisdictions from the Ninth Century (to the Thirteenth), professional assistance became well-nigh indispensable. Declarations made in the judicial forum could not be withdrawn and the necessity for the most cautious formulation brought into requisition the aid of advisers, and then of skilful exponents well instructed in all the rules and phraseology of procedure. These men spoke in presence of their clients who were bound by what they said, unless at once disavowed. They were the "prolocutors," narrators—or serjeants.

Towards the end of the Twelfth Century, the study of law became more systematic and imperative. Ecclesiastical Courts were established by the Bishops under the Presidency of their Delegates. The procedure was regulated, being a modification,—by the canons of the Councils—of the Roman procedure, and about these courts there grew up a body of advocates that were made subject to regulation. They were required to give three years of study to the Canon and Civil law, and to acquiring a practical knowledge of procedure, and to take a professional oath, before being admitted to practice. These advocates not only pleaded, but also prepared the "*libellus*" or complaint and other papers, thus uniting, to this extent as we have seen, the functions of barrister and solicitor.

Clerics were only allowed to practice in cases for the Church and for the Poor—and without fee, while all others were allowed an *honorarium*.

Even after the separation of the functions of Barrister and Solicitor had been thoroughly established, it still remained the privilege of the Barrister to draw all pleadings, and this included complaints, answers, replies and counter-replies.

In 1274 for the first time, an Ordinance of *Philippe le Hardi*, subjected lawyers in the secular courts to regulation and discipline. They were required to renew their official oath each year, promising to take none but just causes and never to claim a fee in excess of thirty livres. Later Ordinances forbade the use of offensive language, and of injurious delays, and required an official roll on which lawyers were inscribed in the chronological order of their admission.

The Ordinance of 1277 prescribed regulations for the presentation of cases, condemning useless repetition and enjoining counsel not to "ravel and embroil" their statements but to make their allegations plain and direct. The same Ordinance made it the duty of the magistrate to listen "peaceably" to the arguments, which was what Ulpian had, centuries before, enjoined upon pro-consuls.

The apparent necessity for this latter provision is recalled by the distinguished advocate Philippe Dupin, the noted defender of Marshal Ney, tried and condemned under the Restoration for his return to the Napoleonic Standard.

Usage required counsel to address the court "bonneted" as palpable evidence of the freedom of speech allowed to counsel. One of the readings of Othello's lines, recalls this symbolism: "My demerits may speak, and bonneted, to as proud a fortune as this that I have reached." In like manner it was the privilege of the Spanish Grandee not to uncover in presence of the King. On the trial of Marshal Ney, before the House of Peers, Dupin was forced to uncover, not only, according to him, by the symbolic removal of his Barrister's Cap, but by the hindrance to the freedom of his defense. This may explain the fervor of his remarks on the deplorable habit of judicial impatience.

"If the profession of the law has its honors," says Dupin, "it has also its annoyances, and among these the most trying, against which lawyers in all times have most complained, and which on occasion has excited their resentment and animosity against the magistrates, is to be needlessly interrupted, and hectored without cause during the progress of an argument. Such interruptions are all the more regrettable that they are apt to bring on altercations

between court and counsel in which self-love plays so great a part that it is difficult for counsel to hold an even balance and avoid excess, while the court may well become at once judge and avenger."

As early as 1302, when the Court of Parliament ceased to make its circuits throughout the country and became permanently located at Paris, the nucleus of the Order which still subsists was formed by the Barristers, now for the first time brought together by a common residence.

In 1327 under Philippe de Valois, Letters Patent regulated the Bar of the Châtelet, which was the criminal jurisdiction of the Paris district.

This ordinance repeated the precision of the Ordinance of 1274 prescribing a Roll of Barristers, and barristers were required not only to take the oath but to be inscribed upon the roll. Here, too, is found the division of Barristers and Solicitors, as it contained a prohibition against the exercise of both functions by the same person. Counsel were not allowed to argue more than three cases at one sitting, and if counsel "prevaricated" he was to be excluded from the Bar of the Châtelet, and from all Royal offices.

Shortly after the Ordinance of 1327, a more formal association was organized, made up of both Barristers and Solicitors, "*Avocats*" and "*Procureurs*," known as the Confraternity of Saint Nicolas. This, as its name implies, was mainly, if not wholly a religious association, and was evidenced by the attendance at Mass, and at various acts of public worship in common. From this sprang, about half a century later, what was known as the "Community of Barristers and Solicitors," the purpose of which was enlarged and included a supervision over the actions of its members in matters of judicial procedure, and the general protection of their privileges.

From this association the Barristers gradually withdrew, and in view of the special rights and privileges accorded to them, formed a separate organization which at the close of the Sixteenth Century took the name of Order of Barristers, electing their own head who was designated as "*Bâtonnier*," from the fact that in all public processions he bore the "*bâton*" or banner of the Order.

Prior to this time the discipline of lawyers was in the hands of Parliament or the Court of Parliament, as the Royal High Court was then designated, and Parliament established additional regulations not covered by the text of the Ordinances, such as the requirements of study, the length of probation, the costumes to be worn, the penalties for any infraction of professional duty, and also enforced punctual attendance of the lawyers to their duties, and regulated the recesses granted to them.

As early as 1662 owing to the increase in their numbers, they were divided into ten sections or "Columns," each of which appointed two delegates to represent it, and these twenty delegates constituted the "Council of the Order" as it still remains to-day,—charged with the regulation of the affairs of the Order, with the discipline of the members, and the guardianship of the Roll of Barristers.

The Order of Barristers was from time to time recognized by various Royal Ordinances, and these, with acknowledged customs, governed the admission of barristers, and their rights and duties.

We have noticed that before the Ecclesiastical Courts, organized by the Bishops towards the end of the Twelfth Century, clerics were only allowed to practice in defense of the rights of the poor or of the rights of the Church, and gratuitously.

Later regulations, extending as far as the Sixteenth Century gave leave to secular clergy to plead before the courts and very many availed themselves of the privilege. Recent rules have, however, declared the condition or profession of an ecclesiastic incompatible with that of an advocate. Their absorption in their religious duties which must of necessity remove them from the real practice of the profession of the law, makes the two occupations incompatible, and to this objection has been added one which the recent laws of separation have removed, to wit, that the members of the clergy receive a salary from the State and are, therefore, dependent for that salary and the means of livelihood, upon the arbitrary law of the State.

A notable instance in which this question was decided was that of the distinguished Dominican, Father Lacordaire, who before becoming an ecclesiastic, had been a Barrister. He had left the Bar for the Church; in 1831 prosecutions were brought against him, Montalembert, Lamennais and others, for the offense of maintaining a School in contravention of the Napoleonic law of 1806, which provided that an Imperial University should be established and should have exclusive control of "all public teaching and education throughout the Empire." He applied for re-admission to the Bar, and his application was denied on the ground that the clerical office was incompatible with the profession of Barrister. He thereupon pleaded his own case in "*propria persona*" as a layman, without the cap and robes of the Barrister.

Once the attempt was made, by Chancellor Maupeou, in 1771, to make the position of the Barrister a purchasable office, and one hundred were appointed by Governmental decree, without examina-

tion, but upon the fall of the Maupeou Ministry in 1774, the decree was rescinded and the office suppressed.

The Order of Barristers was considered by the Revolution as a privileged corporation, and in its not unnatural distrust of every established and influential body, abolished and dissolved it by its Decree of September, 1790, thus extinguishing the authority and prestige which had attached to it through a long and honorable tradition.

The Constituent Assembly, however, acknowledged the right of litigants to have their cases presented by persons of their own selection and from that time until Napoleon's provisional Decree of 1804, litigants were advised and were represented in court by any person whom they might select, the only qualification being that he should be a citizen,—and the Bar, as a body, was eclipsed during that period.

Lawyers, it will be remembered, were not recognized by the sanguinary Tribunal of the Revolution (Decree 22nd of September, 1794). It was not until the Decree of 13th March, 1804, under Bonaparte as First Consul, that provision was made for the re-establishment of a Roll of Barristers, and the requirement renewed of a diploma as Bachelor of Laws, as a requisite to the practice of the profession. This Decree did not, however, resurrect the Order of Barristers which was finally done by the Decree of December, 1810. In the meantime, however, and almost immediately after the Revolutionary Decree, a voluntary association of Barristers had been formed, who made it their duty to hold together and preserve the traditions of their suspended Order, and admitted to their comradeship only men of recognized integrity and approved merit. Even in these troubled times, these high-minded men concerned themselves with recruiting an instructed Bar and established courses of study which were continued until the Order was revived. Among those who thus held together until the re-establishment of the Order, were de Sèze, the courageous defender of Louis XVI, the Elder Berryer, de la Malle, Bonnet, Bellart, Lanjuinais, Pigneau, and others of equal value. Somewhat earlier than 1804, however, under the Consulate in 1800, Solicitors were appointed before the Court of last resort (Court of Cassation), and in 1806, these Solicitors were declared by law to be Barristers with the exclusive privilege of pleading before the Court of Cassation and a like privilege was conferred the same year upon the Barristers who pleaded before the Council of State.

A later Ordinance of 1817 united these two bodies, giving each the privilege of appearing both before the Court of Cassation and

the Council of State, and limiting their number to sixty, a limit which has not since been extended.

It is no small tribute to the profession that Napoleon, as early as 1804, should have recognized the necessity of a trained Bar and have put an end to the condition existing since the Revolutionary Decree of 1790, which had done away with the Bar and permitted such judicial assistance as could be had to be furnished by anyone.

From that Decree to the measure of 1810 was another large step, which we may be sure only a sense of necessity induced Napoleon to make, for in answer to the pleading and pressure exercised by Cambacérès for the re-establishment of the Order of the Barristers, Napoleon wrote: "As long as I wear a sword by my side, I shall not sign such a decree, I want to be at liberty to cut out the tongue of the lawyer who uses it against the Government."

We may, therefore, not be surprised that the Emperor's decree, re-establishing the Order of Barristers, should not have permitted them the ancient liberties and influences which they had so long enjoyed. Domination was essential to him and this Decree deprived the Order of the privilege of nominating their own head and their Council of discipline. Both of these were to be selected by the Solicitor General, the leading law officer of the Empire, as he still is of the Republic. Nor could this Council of discipline be called together nor act without the consent of the Solicitor General, nor could any lawyer plead outside of the circumscription of the court where he was inscribed, except upon authorization of the Minister of Justice.

Other evidences of Napoleon's estimate of the lawyers and his intention to hold them in repression are found in those sections of the law which provide for various unusual possibilities of misconduct, with severest repressions. But the Order was gotten together and with the nucleus which had been kept up by de Sèze, Berryer and the others in the interim, they slowly recovered much of their prestige in the assertion of their rights, so that upon the fall of the Empire, they procured a modification of the Decree concerning them, as early as 1822, although it was far from satisfactory, the monarchy being apparently willing to accept from Napoleon's régime, the legacy of power over the Bar. But finally, in 1830, when the King of France became the "King of the French," further modifications were made, which virtually restored to the Order of Barristers all its former authority, and the ancient traditions in reference to its powers stood formally acknowledged.

Under Louis Napoleon in 1852, there was a slight retrogression, but in 1870 the full privileges of the Order with reference to the election of its Council and its *Bâtonnier*, were restored.



The law requires as the first requisite for admission to the Bar, a diploma of "Licencié" of Laws, granted by a recognized French Faculty. This is submitted to the investigation of the Solicitor General of the Republic (Procureur Général) and upon his satisfactory report the applicant is turned over to the "Order of Barristers." If he passes the ordeal of the investigation by the Order, he is presented to the Court by the "Bâtonnier" or Presiding Officer of the Order or by a member of its Council, and his oath of office is received. The candidate must then apply to the Order for leave to be permitted to enter upon the next stage of preparation, which is a novitiate of not less than three years. The petition is referred to the Council and a Reporter is appointed to look into the facts and report. The candidate makes a formal call upon the Reporter to whom he submits his papers; these must attest his Degree, his official oath, his honorable character, and the dignity and independence which are considered essential to the proper exercise of the profession. The call of the candidate is returned by the Reporter, mutual confidence and the most courteous relations are at once established and a thorough investigation is expected and courted.

Probity is the basis upon which rests the honor of the profession. Independence of all other ties than those of the profession is required and no subservience to any other interest is allowable; any office requiring obedience to a superior, any salaried employment, any business occupation or agency, everything that can tend to impair the allegiance of the lawyer to his client and to the Bar, are held incompatible with the profession, and this extends to the existence of debts and financial obligations. For the same reason, the candidate must have his own domicile, an established residence under his personal control so that clients may at all times have ready access to him. This need not be an independent household and may be in his parents' household, but must not be dependent upon it, so that it may cause any interference with his freedom of consultation with those who are in need of his advice.

Upon the report made to the Council of the Order, discussion is had and a majority vote determines the acceptance or the rejection of the petition. Its acceptance gives the candidate the right to practice his profession, but the right is provisional, as he will not be placed upon the Roll of Barristers until his period of probation has been satisfactorily passed and the sufficiency of his experience definitely established. It is his duty in the meanwhile to be assiduous in his attendance upon the court and at the Bar consultations of the Order. He is a Barrister on probation, and may advise clients, consult with his brethren, appear before the courts, but is

debarred from many privileges only accorded to those who are inscribed upon the Roll of Barristers.

The course of the postulant during the years of probation is under the surveillance of the Council of the Order.

The postulants are divided into columns, presided over by a member of the Council, who instructs them from time to time as to their customs, regulations, duties and rights of the profession, inquires into their observance of the requirements, and records their failures to attend. Weekly meetings are held for study, discussion and consultation, attendance at which is strictly obligatory. These are presided over by the President (*Bâtonnier*) of the Order, and that the discussions may be serious, a careful statement of the questions to be debated is prepared in writing by the Secretary and printed two weeks in advance.

At the end of the term of probation, if the Report as to the progress of the postulant in gathering the requisite experience of his profession is not satisfactory, or if he has failed to reach the high standard of conduct and to maintain the dignity and independence deemed essential to practice at the Bar, the Council of the Order of Barristers may decline to enroll him, or may require another year of probation.

If the assiduity and the progress of the inchoate lawyer have been satisfactory, if his conduct has been such as to attest the moral standard, the dignity and independence of character essential to the exercise of a liberal profession, his name is inscribed upon the Roll and he becomes a member of the Order of Barristers, an upholder of the strict discipline to which he willingly remains subject.

The French law does not take the same view of a counsel's sole duty to his client which Lord Brougham passionately enunciated in the course of his defense of Queen Caroline,—and it is a part of a Barrister's oath of office that "he will never as counsel or advocate, say or publish anything contrary to the laws or regulations against morals, or against the safety of the State or of the public peace."

In the view of the French, the lawyer remains a citizen and is not relieved of his primary duties as such by being invested with the privilege of representing his fellow-citizens in the enforcement of their legal rights. Their theory was expressed by one of their distinguished "*Bâtonniers*," Mr. Rousse, when he said to the assembled postulants for admission to the Roll:

"It is well for you to be reminded that in order to become good lawyers, you must first be good men and good citizens."

Among other requirements of the Barrister's oath is that "he will not fail in the respect due to the courts and to the public authorities."

Freedom of criticism as to judicial proceedings and the decisions of courts is not hampered by this oath; such freedom is held to be vital to the independence of the Bar, but the absolute right of dissent and criticism does not permit denunciation or the imputation of unworthy motives. It is the privilege and the self-imposed duty of the Order of Barristers to see that the Barrister whose name has with its sanction been placed upon the Roll shall demean himself in accordance with the high obligations imposed upon him. For any infraction the order imposes punishment by reprimand, by suspension or by striking the name of the offender from the Roll.

What modifications have been made in later years curtailing the complete powers of the Order over all its members, has been the work of jurisprudence, and it is not uninteresting to trace, in the land of Codification, the power of modification still exercised by the courts.

It was claimed from the outset by the Order of Barristers that the Order had uncontrolled jurisdiction over its roll of membership, in other words, over the Roll of Barristers. That it, and it alone could determine what Bachelors of Laws should be admitted to probation, and which of them after probation, should be placed upon the Roll of Barristers, and that no appeal lay from the decision of the order. This claim was upheld by numerous decisions and Solicitor General Dupin, the distinguished Advocate already mentioned, insisted that to permit any appeal from the decision of the Council of the order, would be destructive of the very purpose of their jurisdiction; that the Council was a Grand Jury where each was judged by his peers, the purpose and effect of which was to constitute an absolutely independent body where each man was on a par with every other. Such was the ancient jurisprudence of the Court of Parliament, and the modern Decree of 1822 had formally declared that all the ancient customs and usages of the Bar should remain in full force, and permitted an appeal only from an order of disbarment or suspension; but the courts gradually extended this right of appeal and began by applying it to a case where a Barrister asked for reinstatement after resignation and to cases where lawyers abandoned the Bar of one Department to take up practice at the Bar of another. In all these cases the court held that a refusal to reinstate or the refusal to admit in one Department, a lawyer coming from another, was an interference with an acquired and vested right and in that respect on a par with disbarment. Going further, the Court of Cassation in 1867 declared that the decisions of the Council declining to inscribe the probationer upon the Rolls at the end of his probation, was likewise an interference

with a vested right,—that the probationer was in fact a Barrister entitled to be put upon the Roll when he had passed his probation.

Again the courts stretched the doctrine still further and granted a right of appeal to Bachelors of Laws, who having taken the oath have been refused admission as probationer, arguing that the diploma of Bachelor of Laws procured after years of study gave to its holder a vested right to the next step for admission to the Bar, the probation or "stage." This left to the Order nothing but the right of disciplining the Barrister for misconduct, and finally even upon this question, appeals are allowed upon the theory that the right of appeal is a common law right and that if the courts could not exercise a right of review over the action of the Order of Barristers, it would constitute a monopoly of the profession contrary to public policy, which requires that the profession should be free to all who fulfill the conditions established by the law, and that as the Order of Barristers has no right to add to the requirements of the law, it has not the right to reject applicants who comply with the conditions imposed by the law.

The legal right of the lawyer to his *honorarium* has passed through several phases. In the thirteenth and fourteenth centuries, a maximum of thirty livres had been fixed, but lawyers were allowed to bring suit for the recovery of the fee if it was not paid and their claims were preferred; the court, however, reserved the right to reduce the *honorarium* demanded, if it was deemed excessive. The maximum fixed by the Ordinances was not often respected.

As early as 1345 the purchase of claims or rights in litigation was forbidden, as well as fees contingent upon recovery, or compensation by share in the recovery.

In more modern times the *honorarium* was considered as purely gratuitous and suit could not be brought for its enforcement nor was it permitted to make payment in advance a condition of service. This latter prohibition has been relaxed as there was reason to believe that it was frequently, if not generally disregarded, although there are not wanting very numerous instances where lawyers give their services absolutely in the spirit of the requirement.

Although the courts now recognize a lawyer's right of recovery at law, he is not permitted by the ethics of the Order to send a bill for professional services, nor is he permitted to give a receipt or release for an *honorarium* paid him, for that would imply an obligation and its discharge. This was not always so. In former centuries, it was the practice of lawyers to give their clients receipts for the fees paid, but the practice was gradually abandoned. Ill-

disposed persons suggested that it was abandoned because the lawyers who were habitually too exacting, did not care to have their exactions attested by written receipts, and finally an Ordinance of 1579 prescribed, under penalties, an obligation to give written receipts for fees received. This Ordinance was not observed, and in 1602 a Decree of the Parliament of Paris was issued to compel its enforcement. Three hundred lawyers joined in protesting against such a Decree and rather than submit to it, asked that their names be stricken from the Rolls. This professional "strike" was the cause of much confusion and alarm, for the cause of justice was interrupted. The King was appealed to and Henry IV with that genius for accommodation which was one of his titles to popularity, upheld the principle of the Decree, but restored the lawyers involved to the Roll and permitted them to continue the exercise of their profession without condition.

By the ethics of the Order, again the lawyer is bound to give his advice and his services gratuitously to all who have recourse to him and who are too poor to remunerate him.

In France the Bar looks with the utmost disfavor upon any attempt on the part of a Barrister to enforce a claim for his *honorarium*, and although as we have said the law recognizes such a claim and the courts will enforce it if appealed to, the Order of Barristers considers its assertion as an infraction of the dignity of the profession and reprobates it to the extent of declaring such a course on the part of any lawyer as improper, and the offender liable to reprimand, which at the French Bar is still considered a dishonor.

The custom of yearly employment of counsel, so widely spread in these modern days of corporate activity and embracery is not of as recent origin as one might suppose. As early as the Sixteenth Century it was customary for the King and for Towns and Communities, for the nobility and for wealthy merchants, to retain one or several lawyers by the year.

Indeed the practice, which has been known sometimes to prevail in recent years, was introduced of retaining on occasion all the distinguished lawyers within a given circumscription, leaving the adversary barren of equal opportunities in selecting a defender. This practice was, however, early recognized as reprehensible and an Ordinance of Francis I of 1536, required the courts to distribute counsel according to the demand of the party who had been prevented from a proper selection. Indeed, this relief was recognized in practice as early as 1369 when Simon De Lafontaine, himself a distinguished lawyer before the Parliament of Paris, having litigation with the Religious of St. Denis, demanded that one Jean Pas-

rourel should be assigned to take his case against the Religious, he having refused De Lafontaine's application to him on the ground that he was a Vassal of the Religious and could not plead against them.

The reason successfully assigned by De Lafontaine for his request was that his opponents had engaged as counsel Nicolas Romain and that Pastourel and Romain were acknowledged as the two leading lawyers on feudal questions, and that the question before the court was one of feudal rights, and that if the Religious were allowed to retain Romain and silence Pastourel, there would be great inequality between the litigants.

Some of the requirements of the professional standard may contribute to give us an idea of the honor in which the profession is held and which it in turn upholds.

No solicitation of clientage is permitted—no sign outside of his office—no name upon his letter-heads, no indication of his profession, nor of office hours—the only thing permitted on letter-heads is the address. His only recommendation must be the care, the study, the labor, the knowledge devoted to the cases in his charge.

Counsel are bound to communicate to each other the originals of all documents making up their respective cases—their briefs, memoranda and findings. Nothing must be held back—there must be no concealment, no surprises.

Counsel is free in the choice of his methods. He is not bound to follow the instructions of his client, whom on the contrary it is his duty to instruct. The Barrister is not merely the organ or representative of his client, he is first to be his judge; it is his duty to examine into his client's case with as keen a conscience as he would look into his own, and his conscience will forbid him to aid in the success of an unjust cause.

When during the trial the facts developed are such as to preclude a defence in accord with the truth, counsel must not therefore abandon the accused; he may still assist the culprit upon questions of law and of procedure.

The lawyer, said Dupin, early in the Nineteenth Century, is not a public functionary, but a private citizen, who, devoting his time to the vast study of the law, takes upon himself to enlighten other men upon their rights, defend their property against fraud, their liberties against the encroachment of power, their persons against the snares of hate and the perils of oppression.

D'Aguesseau had already in the previous century described him as one standing for the public weal between the storm of public pas-

sions and the throne of justice, and laying at the foot of that throne the petitions and the claims of the people.

Never take pride in having clouded the truth; more sensitive to the interests of justice than to the desire for an idle reputation, seek rather to bring out the righteousness of your cause than the brilliancy of your intellect—was the advice of D'Aguesseau in 1698.

The character of the lawyer, as understood in France, is perhaps best summed up in the language of Camus—"to devote one's self and all one's faculties, to the good of others; to give one's self up to long study in order to resolve the doubts which a great number of our laws engender; to become an orator in order to assure the triumph of oppressed innocence, to consider the privilege of holding out a helping hand to the poor as a reward to be preferred to the most expressive gratitude from the great and the rich; to defend the poor from duty and the rich from interest. These are the traits which should characterize the lawyer."

Under the old régime the general influence of the profession in political history and in the literary and judicial annals of the country was great, in spite of the fact that the virtually autocratic form of monarchical government was not favorable to the influence of the lawyer, whose power is so largely dependent upon freedom of speech and the free discussions of deliberative assemblies. Nevertheless, it was not possible for the members of a profession, really learned and liberal, to be kept in the background. Their independence and their influence was shown in many great trials where momentous questions, exciting the animosities of powerful interests, were met without evasion and discussed without restriction. They were not infrequently called into the Councils of the nation and faithful to the training and the traditions of the profession, neither fear nor favor swayed their judgments. An instance of this is the conduct of D'Aguesseau when Solicitor General during the last year of Louis XIV. In defense of what he considered the good of the State he opposed the will of that redoubtable sovereign with reference to the Pope's Bull, *Unigenitus* in condemnation of Quesnel's Jansenism, and even when summoned to a personal audience persisted in his resistance.

It was this Chancellor who proudly said that "the profession of the law is as ancient as magistracy and as necessary as justice." As much to-day as at any time the powerful influence of the profession upon the even and equal distribution of justice makes of it an essential element in the preservation of social order.

*Paul Fuller.*

## CLAIMS OF TERRITORIAL JURISDICTION IN WIDE BAYS.

By a recent decision of the High Court of Justiciary in Edinburgh<sup>1</sup> (the Supreme Criminal Court of Scotland), a clause in an Imperial Statute<sup>2</sup> has been interpreted as an affirmation by the British Parliament of territorial jurisdiction, at least for the purpose of fishery regulation, over an area of water on the northeast coast of Scotland more than two thousand geographical square miles in extent, and bounded by an imaginary line drawn between headlands eighty miles apart. Correct as the decision no doubt was, it arrested the attention of those interested in international law by its attribution to the British Parliament of a reaffirmation of the theory of the "King's Chambers," which, though at one time supported by Kent, Wheaton and Phillimore, has found but little support from more recent English authorities like Hall<sup>3</sup> and Westlake,<sup>4</sup> and has been regarded by continental writers as having been abandoned as a general principle by Great Britain and the United States in the second half of the nineteenth century.<sup>5</sup> The theory itself, which dates from the time of John Selden,<sup>6</sup> was a claim of "rights of property and exclusive jurisdiction" over tracts of water along the coast of England enclosed by lines drawn from headland to headland, irrespective of the distance between them. It originated, says Selden, in 1604, when, during the war between Spain and the United Provinces, in which England was neutral, the belligerents did not refrain from carrying on hostilities even in English waters. To prevent their incursions, James I., by ordinance of March 2nd, 1604, caused the limits of these waters to be fixed, and appointed experts to describe the parts of the sea adjoining his kingdom in which the belligerents should enjoy the royal protection. These were also designated upon a map (which is reproduced in *Mare Clausum* [1635

1. *Mortensen v. Peters* (July 20th, 1906), *Scots Law Times*, xiv., p. 227. The case has not yet appeared in the Court of Session Reports.

2. Herring Fisheries (Scotland) Act, 1889.

3. Hall, *International Law*, 5th edition, p. 156.

4. Westlake, *International Law*, i., p. 188.

5. Nys, *Droit Int.*, i., p. 447.

6. Selden, *Mare Clausum seu de Dominio Maris* (1635), lib. ii., cap. ii., pp. 236, et seq.



ed.], p. 239) by lines joining the extreme promontories, and to the space of water included thereby was given the name *King's Chambers, regiae camerae* or *chambres royales*, "to show," says Selden, "that the King was master there."

It is this principle of determining the bays in which a littoral State may exercise jurisdiction that appears to have been revived three hundred years later in argument before a Scots Court, which indeed proved itself not averse from using it to justify the claim which it was constrained to hold that Parliament had made.

It is only fair to mention that the clause containing this claim is an isolated clause in an Act dealing with the regulation of herring fisheries, but it relates to a portion of the sea which Great Britain, by signing the North Sea Convention of 1882, had already agreed, perhaps for another purpose, to treat as high seas forming the German Ocean. Moreover, the claim is inconsistent with a provision in the subsequent Herring Fishery Act of 1895, setting forth the conditions under which the Fishery Board of Scotland may make regulations for herring fishery in waters up to thirteen miles distant from the coasts of Scotland. These points will afterwards be set forth in detail. Meanwhile I desire to make some mention of the way in which wide bays are treated by individual States and by international treaties with reference to territorial rights in them.

Of late years considerable attention has been given by International lawyers to questions concerning territorial waters, not merely with regard to their seaward limit but also to the nature of the rights possessed in them by the states whose coasts they bathe.<sup>7</sup> But the discussion passes over the problem of delimiting the extent of wide bays because it relates mainly to the maritime belt which extends into the open sea and is distinguished from proprietary waters in which the littoral state has full rights of sovereignty. These proprietary waters it is generally stated include ports, harbors, roadsteads, estuaries, bays and gulfs.

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7. See "Territorial Waters; 'Questionnaire' Replies and Report." Extracted from the 15th Annual Report of the Association for the reform and codification of the Law of Nations; London, 1893. The Report contains the replies received as to the existing law of Canada, Sweden and Norway, Germany, Italy, Spain, and Austria, in answer to the "Questionnaire" drawn up and circulated by an influential and representative Committee on Territorial Waters appointed by this Association in 1887. In an appendix is contained the proposals with motifs, which Mr. (now Sir Thomas) Barclay submitted for adoption to the Institute of International Law at its Geneva meeting in 1892. Hereinafter referred to as Report. Cf. also *Annuaire de l'Institut de Dr. Int.* XII and XIII; Godey, "*La Mer Côtière*," Paris, 1896; Schücking, *Das Küstenmeer im int. Recht*, Göttingen, 1897; and de Lapradelle, *Le Droit de l'État sur La Mer Territoriale*, Paris, 1898.

The distinction is not of recent date for it was taken by Cockburn, C. J., in the great case of *Regina v. Keyn*, 1876, R. 2 Ex. Div. 63 at p. 162 (which led to the passing of the British Territorial Waters Jurisdiction Act of 1878). He there pointed out that by the ancient common law of England a bay, gulf, or estuary *inter fauces terrae* was considered part of the realm of England so that an offence committed in parts of the sea so circumstanced could be dealt with by the common law because they were considered to be within the body of the adjoining county or counties from which the jury is to ascertain the fact required to be drawn. The distinction has been followed in the Scots Court,<sup>8</sup> and it is well recognized by continental writers and by the Institute of International Law. Thus in Germany, to take only one instance, v. Liszt<sup>9</sup> terms such waters *Eigengewässer* in opposition to *Küstengewässer* or coastal waters in which, for his part, he concedes only a limited right of sovereignty to the littoral state. The Institute in Resolutions<sup>10</sup> adopted subsequently to those dealing with territorial waters<sup>11</sup> (to which we shall afterwards refer) said in Section 2:

*Les dits ports, havres, anses, rades et baies (c. à d. baies et havres qui peuvent être assimilés à ces anses et rades), non seulement sont placés sous un droit de souveraineté des États dont ils bordent le territoire mais encore font partie du territoire de ces États.*

When, however, we inquire if there is any limit to the extent of the bays which are thus considered to form part of the territory of the littoral state we find no unanimity as to the rule of measurement. The continental writers incline to state the rule without due regard to state practice or with too much regard to international conventions which are not of universal application, v. Liszt, for example, says that the line of demarcation between territorial and coastal waters in bays is usually fixed by an imaginary line drawn from shore to shore at a point where the center of it is within range of batteries erected on either shore. *Despagnet*<sup>12</sup> subordinates the very existence of the limited right of sovereignty which he also concedes, to the condition that the littoral state can exercise complete command over the bay or gulf in its whole extent, which therefore,

8. *Lord Advocate v. Trustees of the Clyde Navigation*, 1891, 19 Court of Session Reports (4th series), p. 174, *per* Lord Kyllachy (Judge of First Instance).

9. *Das Völkerrecht*, 3rd ed. (1904) p. 85.

10. *Projet de règlement sur le régime légal des navires et de leurs équipages dans les ports étrangers* (1897), XVI Annuaire, p. 231.

11. *Définition et régime de la mer territoriale* (1894), XIII Annuaire, p. 328.

12. *Cours de Dr. Int.* (1905) Section 406.

he says, ought not to exceed double the range of cannon shot from the shore. Some English writers on the other hand discard all artificial limitations depending on the range of cannon shot and rest their claim on the proximity of headlands enclosing the waters in question. Thus, according to Wheaton,<sup>13</sup> the maritime territory of every state extends to the ports, harbors, bays, mouths of rivers and adjacent parts of the sea *enclosed by headlands belonging to the same state*. Phillimore<sup>14</sup> (who upholds Britain's ancient claim to the King's Chambers) states the rule in words containing only slight alterations for the sake of clearness. But this rule is not less objectionable than that based on artificial limits. It suffers from vagueness, and gives no criterion of the distance between the "headlands" or of the meaning of "enclosed." The headlands might indeed be as far apart as the South Cape of Florida and the mouths of the Mississippi between which Chancellor Kent proposed to draw a line to mark off the territorial rights of the United States in the Gulf of Mexico. Hall<sup>15</sup> who is much more cautious puts his finger on the true criterion, without indeed being able to give it precision, when he says that there is nothing in the conditions of valid maritime occupation to prevent the establishment of a claim to basins of considerable area if approached by narrow entrances such as the Zuyder Sea or to *large gulfs which, in proportion to the width of their mouths, run deeply into the land*, even when so large as Delaware Bay or still more to small bays such as that of Cancale.

The physical configuration and economic importance of bays vary so much that it is perhaps hopeless to expect greater precision in a rule which shall be applicable to them all, but it is well to insist on the element to which Hall refers. He puts in another way the words *intra fauces* with which Lord Cockburn qualified the bays that the ancient common law reckoned as part of the realm, and which Wheaton and Phillimore had in view when they spoke of bays being enclosed by headlands. As Dana said before the Halifax Fishery Commissioners,<sup>16</sup> "Names will not help us. The Bay of Bengal is not national property, it is not the King's Chambers; nor is the Bay of Biscay, nor the Gulf of St. Lawrence. An inlet of the sea may be called a bay and it may be two miles wide at its entrance, or it may be called a bay and it may take a month's passage in an old-fashioned sailing-vessel to sail from one headland to the other."

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13. Ed. Atlay (1904) p. 275.

14. I. Int. Law, 284.

15. Int. Law, 5th ed.

16. (1877) Appointed under the Treaty of Washington, 1871, quoted in I Phillimore, 288.

The element of configuration to which Hall refers is important because it implies that the littoral state can command the entrance by armed force from the shore. It would, however, be wrong to assume that the width of the entrance must not exceed twice the three-mile limit because that limit relates to the extent of the maritime belt from which proprietary waters such as bays are distinguished, and because the entrance to the bay takes the place of low-water mark which is the usual starting point for reckoning the limit. Moreover it is impossible to say that the three-mile limit is a rule of international law binding on all states at all times and for all purposes. Originating as a working rule based on the principle of Bynkershoek *Potestatem terrae finire ubi finitur armorum vis* (that the power of a state extends so far as it can reach), it has been rendered by the increase in the range of modern cannon quite inadequate for the protection of a littoral state.<sup>17</sup> No state uniformly adopts it as a maximum for all purposes. The Territorial Waters Jurisdiction Act, 1878, for instance, proceeds on a preamble which carefully abstains from laying down any general limit,<sup>18</sup> and solely for the purpose of criminal jurisdiction over vessels in such seas defines territorial waters to be within one marine league from low-water mark, and although the limit is commonly adopted for neutrality purposes, the British Foreign Enlistment Act of 1870<sup>19</sup> simply refers to territorial waters without defining them.

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17. As early as 1864, Mr. Seward, on behalf of the United States, suggested to the British Legation at Washington that in view of the increased range of projectiles the limit for neutrality purposes should be extended from three miles to five. On the assumption that the neutral littoral zone within the existing limits was entitled to the same protection as neutral soil, Mr. Seward further suggested that belligerent war vessels should be prohibited from opening fire within three miles of it. If the three-mile limit were retained, and the increased range of cannon taken at five miles, he proposed that the prohibition should be directed against firing within eight miles of the neutral coast. Cf. Bluntschli, *Droit Int. Codifié*, tr. Lardy, 3rd ed. p. 189. Fuller in Nys, *Droit Int. L.* p. 512.

18. The rightful jurisdiction of H. M., her heirs and successors extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of H. M. dominions *to such distance as is necessary for the defence and security of such dominions*.

19. The circular of 10th February, 1904, issued by Lord Lansdowne on behalf of the Foreign Office under this act and addressed to the Lords Commissioners of the Admiralty with regard to the rules to be observed to maintain the neutrality of Great Britain during the Russo-Japanese war refers to "British ports, roadsteads, or adjacent waters subject to the territorial jurisdiction of the British Crown."

The Sea Fisheries Act, 1883 (46 and 47 Vic. c. 22), afterwards referred to, which carries into effect as regards Great Britain the provisions of the North Sea Convention of 1882, also abstains from giving a general definition even to the exclusive fishery limits of Great Britain.

The preamble to the Paris Resolutions<sup>20</sup> adopted by the Institute of International Law in 1894 proceeds also on the insufficiency of the three-mile limit for the protection of fishery rights. To meet the new conditions, the Institute recommended *de lege ferenda* a distance of six geographical miles, measured from low-water mark, for adoption as a general rule, allowing (Art. 4) a riparian State in time of war to fix by its declaration of neutrality, or by special notification, its neutral zone beyond the six miles up the range of guns on the coast.<sup>21</sup>

For the purpose of this paper it will be sufficient to quote Articles 1 to 3 of the Resolutions which run as follows:—

"1. L'état a un droit de souveraineté sur une zone de la mer qui baigne la côte, sauf le droit de passage inoffensif réservé à l'article 5.

"2. La mer territoriale s'étend à six milles marins (60 au degré de latitude) de la laisse de basse marée sur toute l'étendue des côtes.

"3. *Pour les baies*, la mer territoriale suit les sinuosités de la côte, sauf qu'elle est mesurée à partir d'une ligne droite tirée en travers de la baie dans la partie la plus rapprochée de l'ouverture vers la mer où l'écart entre les deux côtes de la baie est de *douze*

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20. Considérant qu'il n'y a pas de raison pour confondre en une seule zone la distance nécessaire pour l'exercice de la souveraineté et pour la protection de la pêche littorale et celle qui est pour garantir la neutralité des non-belligérants en temps de guerre; que la distance la plus ordinairement adoptée de trois milles de la laisse de basse marée a été reconnue insuffisante pour la protection de la pêche littorale; que cette distance ne correspond pas non plus à la portée réelle des canons placés sur la côte."

21. After the publication of the Paris Resolutions the Dutch Government, in December, 1895, addressed a Collective Note to the Powers, inviting them to an international agreement based on these resolutions, which would have had the effect of making the second neutrality zone proposed by the Institute and extending to twelve miles from low-water mark obligatory on all the Powers. The increased obligations which this project would have imposed upon neutrals in maintaining respect for their neutrality led to the rejection of the proposal. It was felt, moreover, that the adoption of this limit might lead to violations of neutral territory on the part of belligerents in consequence of the limitation of the theater of marine hostilities. Cf. Godey, *La Mer Côtière*, 1896, p. 24; Nys, *Int. Law*, i., p. 513; Schücking, *Die Verwendung von Minen im Seekrieg*; *Zeitschrift für Int. Priv. u. Off. Recht*. (1906), xiv., 121, at 138.

milles marins de largeur à moins qu'un usage continu et séculaire n'ait consacré une largeur plus grande."

Several well-known decisions on the territorial character of wide bays would fall under the exception, under-lined above, which the Institute was constrained to admit to its proposed rule of measurement. They were nearly all cases of true bays for the width of their entrance though greater than double the three-mile limit was much less than the extent to which they ran into the adjoining land. Thus *Chesapeake Bay*, a long arm of the Atlantic Ocean, running roughly north and south, and cutting into the States of Virginia and Maryland, is claimed by the United States. Measuring twelve miles in width at its entrance between Cape Charles and Cape Henry, in the State of Virginia, it is at least two hundred miles in extent, although it is probably nowhere more than twenty miles wide. The territorial character of this bay was, after mature deliberation, judicially affirmed for all purposes by the American Court of Commissioners of Alabama Claims in the case of the *Alleganean*,<sup>22</sup> in which it was essential for the Court to decide whether a particular place in the bay south of the Rappahannock River, and more than four miles from any land, was, or was not, in the "high seas" within the meaning of Section 5 of Act of Congress of June 5th, 1872, which entitled American citizens, under certain circumstances, to recover compensation from the United States for losses sustained by the depredations of the Confederate navy in the Civil War.

*Delaware Bay*, fifteen miles in width at the entrance, was claimed by the Executive Government of the United States in 1793, when, at the instance of Great Britain, they compelled the restoration of the British ship *Grange*, which had been captured by the French in the bay, in violation of the neutrality of the United States.<sup>23</sup> This claim, in which both Great Britain and France acquiesced, depended, according to Wharton,<sup>24</sup> solely on "the fact that the United States are proprietors of the lands on both sides of the Delaware, from its head to its entrance to the sea." Here also we have an application of the King's Chambers theory.

Long Island Sound, between Long Island and the State of Connecticut, was held to be part of New York State, and subject to its jurisdiction.<sup>25</sup>

22. *Albany Law Journal*, xxxii., 484; *Moore's Int. Arbit.*, iv., 433; *id.*, v., 4675; *Scott's Leading Cases on Int. Law*, 143.

23. *American State Papers*, i., 73.

24. F. Wharton, *A Digest of the International Law of the United States*, vol. i., p. 75, Section 28.

25. *Mahler v. Transportation Company* (1866), 35 N. Y. 352. Quoted in *Scott's Leading Cases on Int. Law*, p. 153.

On the other hand, the claim of Great Britain that the *Bay of Fundy*, lying between New Brunswick and Nova Scotia, was a British bay, from which United States fishermen were excluded by the Treaty between Great Britain and the United States of 1818, has been abandoned since 1845.<sup>26</sup> This bay, which is from sixty-five to seventy-five miles wide, and from one hundred and thirty to one hundred and forty miles long, with several "bays" in its coasts, has one of its headlands in the United States (Maine), and it must be traversed for a long distance by vessels bound to Passamaquoddy Bay (lying between Maine and New Brunswick). Moreover, it contains a United States island, Little Menan, on the line between the headlands. For these reasons, Mr. Bates, the umpire to whom the claim of the owners of the United States schooner *Washington* (seized and confiscated for illegal fishing in the bay under the Treaty of 1818) had been referred, under the provisions of the Treaty of Washington, 1871, decided that the bay must be considered as an arm of the open sea.<sup>27</sup>

The territorial character of the *Bay of Conception*, in Newfoundland, which runs forty miles into the land, and has an entrance twenty miles wide, was unanimously affirmed by the British Privy Council in 1877 in the case of the *Direct United States Cable Company, Limited, v. The Anglo-American Telegraph Company, Limited*.<sup>28</sup> The court here went partly on the configuration of the bay, and partly on the historical evidence of a continued claim to territorial sovereignty on the part of Great Britain.

The only case prior to *Mortensen v. Peters*, already mentioned, in which a British court has had to deal with the territorial character of a large arm of the sea in England, is *Regina v. Cunningham* (Bell's *Crown Cases*, 86), relating to the Bristol Channel. Here the Queen's Bench expressed the opinion that the whole of this channel between Somerset and Glamorgan is to be considered as within the counties by the shores of which its several parts are respectively bounded. It follows, therefore, that, in the opinion of the Court, the Bristol Channel so defined was subject to the territorial sovereignty of Great Britain.

The following description of the Bristol Channel is condensed from the judgment of the Privy Council in the *Direct United States Cable Company's* case:—

It is an arm of the sea dividing England and Wales, into the upper end of which the River Severn flows. On the English side its boundary is

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26. Cf. *Phillimore, Int. Law*, i., p. 289.

27. *Report of Commissions of Claims*, 1853, p. 170. Quoted in *Wharton, Digest*, iii., Section 305, at p. 59.

28. *Law Reports, Appeal Cases*, ii., 394.

formed by the counties of Somerset and Devon, and on the Welsh side by the counties of Glamorgan, Carmarthen, and Pembroke. The channel widens as it descends, and between Port Eynonhead, the lowest point in Glamorgan, and the opposite coast of Devon, is, roughly, twenty miles wide; while lower still, between Hartland Point, in Devon, and the opposite coast of Pembroke, the width is about thirty-seven and a half miles. The case did not decide what was to be regarded as the entrance to the Bristol Channel, but it is incidentally stated in the case reserved for the opinion of the court, that from Penarth Roads, where the crime was committed, to the mouth of the channel, is a distance of ninety miles. This, as the Privy Council indicate, would point to the headlands in Pembroke, and Hartland Point, in Devon, as being the *faucets* of that arm of the sea.

The opinion was perhaps unnecessary for the decision of the question at issue, as the court was only asked to decide whether a particular spot in Penarth Roads in the Bristol Channel, and ten miles from the coast of Somerset, on the opposite side at which three foreigners on board a foreign ship had committed a crime, was within the county of Glamorgan in Wales, the indictment having, whether necessary or not, charged the offence as having been committed in that county. After an elaborate argument the indictment was sustained, and the opinion which I have quoted was also expressed.

From the Report of the Association and other sources one is able, apart from decided cases, to give some indication of the municipal law as to bays in countries other than those already mentioned. Thus, with regard to *Canada*, Mr. A. R. Gordon<sup>29</sup> says:—

"The contention of Canada has ever been that all bays are territorial waters, where both headlands forming the extremities are within the territory of the State. As declaratory of this right the Bay of Chaleur has been continuously closed to the United States fishermen since shortly after their denunciation of the Fishery Clauses of the Washington Treaty, 1871, the distance from Birch Point Lighthouse to Point Macquereau Light being sixteen miles, these two points having been selected as being easily discernible objects to define the delimiting line, though the narrowest part of the entrance is between N. Nya Point and Macquereau, and is only fourteen and a half miles. Excepting this bay, all other bays exceeding six miles in width at entrance have been, as an act of grace, opened temporarily as a fishing-ground to United States fishermen in common with our citizens."

*Western Australia*, says Mr. Haynes,<sup>30</sup> gravely advances an ambiguous claim to all bays the headlands of which are "in sight

29. *Report*, p. 1. Replies of Mr. A. R. Gordon, Canada.

30. "Territorial Waters and Ocean Fishery Rights," by T. H. Haynes; *Report of Guildhall Conference of the Association for Reform, etc., of Int. Law*, 1894, p. 107.



of one another." The colony also claims Exmouth Gulf, twelve and a half miles across, and Shanks Bay, with passage thereto, thirteen and a half and twenty miles in width. In 1889, she obtained a Pearl and Bêche-de-mer Fishing (Extra-territorial) Act, which received the Royal Assent in 1890, and empowers her to apply her local Fishing Acts to British vessels engaged in pearl fishing beyond the three-mile limit of the coast of the colony. The effect of the Act is to subject such vessels not only to an export duty on shells raised by them outside the said limit, but to an import duty on stores which they take on board from their own vessels, and which may never have entered the Colony.<sup>31</sup>

The *German Empire*, long before the North Sea Convention of 1882, which suggested the rule to France and Belgium, limited its claim of territorial sovereignty, at least as regards exclusive fishery rights, to bays which are not more than *ten* sea miles in width, reckoned from the extreme points of land. The acquiescence of Great Britain in this claim is shown by the Notification of the Board of Trade of December, 1874, issued for the guidance and warning of British fishermen fishing off the coasts of the German Empire. The Notification recited that an agreement had been reached between the governments of the respective countries regarding the regulations to be observed by British fishermen, and detailed the exceptional circumstances in which such fishermen were allowed to enter these limits.<sup>32</sup> Germany claims also the Bay of Stettin, in the Baltic, and Jade Bay, in the North Sea (formerly the estuary of the Weser).<sup>33</sup> The territorial character of the Frisches Haff, near Königsberg, and the Kurisches Haff, near Memel, are incontestable, since these

31. *Report*, p. 97. Notes by Mr. T. H. Haynes.

32. Herstlet, *Commercial Treaties*, xiv., p. 1058, altering Notification of exclusive fishery limits of North German Confederation, October, 1868, given at p. 1055, *ante*. These limits were designated by the Imperial Government as follows:—"The tract of the sea which extends to a distance of three sea miles from the extreme limit which the ebb leaves dry of the German North Sea coast and the German islands or flats lying before them, as well as those bays and incurvations of the coast which are ten sea miles or less in breadth, reckoned from the extremest points of the land and the flats, must be considered as under the territorial sovereignty of the German Empire." The application of this rule would apparently give to Germany the Mecklenburger Bucht, which measures ten geographical miles (15-1 degrees) between Staber Huk, on the Island of Fehmarn, and Darsser Ort, in Pomerania, and Kieler Bucht, measuring the same distance between Schaaby, in Alsen, and Markelsdorfer Huk, on the Island of Fehmarn. On the other hand, the Danziger Bucht, if measured between Rixhöft and Brüsterort, appears to be thirteen and a half sea miles wide at the entrance. See Debas, *Neuer Handatlas* (1897), sheets 16 and 17.

33. Oppenheim, *Int. Law*, (1905), i, p. 247.

waters are practically land-locked. The estuary of the Elbe is also claimed as German.<sup>34</sup>

Norway, which possesses the most indented coast-line in Europe, has, from ancient times<sup>35</sup> asserted for all purposes a four-mile limit to its territorial waters, which are measured, not from the mainland, but from the outermost island off the coast which is not submerged by the sea.<sup>36</sup> It was because she was unable to obtain international recognition for this claim that she withdrew from the Hague Convention of 1882,<sup>37</sup> on the policing of the fisheries in the North Sea, and is not a signatory to the Convention to which that Conference led.<sup>38</sup>

With regard to bays, "l'on estime en général," says Kleen,<sup>39</sup> "que si une baie s'enfonce dans une côte, la ligne, qui constitue la limite extérieure du territoire maritime, n'a nullement besoin de suivre la côte exactement, mais qu'elle peut être tirée parallèlement à une ligne droite entre les deux pointes du continent, qui gardent l'entrée de la baie. Même loi, si les deux pointes en question sont formées par deux îles ou brisants en dehors de la côte."

The most recent Norwegian application of the same principle is found in the Royal Resolution of September 9th, 1889, by which the exterior limit of the maritime territory in which fishing is exclusively reserved to Norwegian subjects, is defined with regard to the coast of Romsdal's Amt<sup>40</sup> by a line starting from a point almost due

34. See *Proc. Verb. de la Conférence de la Haye*, 1881. "Pêche dans la mer du Nord," Martens's *Nouv. Rec. Gén.*, 2nd Series, ix., p. 510.

35. Kleen, in the *Report*, mentions a Danish Decree of October 17th, 1868, in which this claim is made.

36. *Bestemmelser om Territorial-Graendsen*, Section 1. By Rescript of February 25th, 1812, it is provided that the territorial limits "shall be reckoned to the ordinary distance of a sea mile from the outermost island, or islet, which is not submerged by the sea." Quoted in *Norsk Fiskeralmanak udgivet af Selskabet for de Norske Fisheriers Fremme*, Bergen, 1903, p. 215. Kleen (*Report*, p. 20), adds: "Bien entendu sous condition que cette île ou ce brisant ne soit pas situé plus loin de la côte qu'une lieue géographique;" but this condition does not appear in the Rescript.

37. "Le délégué de la Norvège, M. E. Bretteville, ne peut pas accepter la fixation des limites territoriales à 3 milles, surtout en ce qui concerne les baies."—*Procès-verbaux* in Martens's *Nouv. Rec. Gén.*, 3rd series, ix., p. 510.

38. *Procès-verb.* No. 2, 6 May, 1882; Martens, *ut sup.*, p. 554. Cf. also *Annuaire*, XI, 141.

39. *Report*, p. 19.

40. "A line drawn at a distance of one geographical mile and parallel to a line from Storholm over Skraapen (outside Haro), Gravskjaar (outside Ona), and Kalven (the outermost of the Orksjaerne) to the outermost Jaeveleholm (outside Grip), is to be regarded as the seaward limit of the corresponding coast of Romsdal's Amt in which fishing is reserved exclusively to the population of this country."—(Quoted in *Norsk Fiskeralmanak*, p. 215; cf. *Report*, p. 25, n. 1.)

north of Aalesund, and running in a northeasterly direction to a point due north of Kristiansund, enclosing a considerable extent of water off the coast of Romsdal's Amt. The islands from which the line is drawn are those lying farthest out from the mainland at the points in question, and are more than twenty miles apart.

*Spain* claims to exercise jurisdiction over a zone extending six miles from its coasts, and this, according to Riquelme,<sup>41</sup> has never given rise to any claim or protest on behalf of other States.<sup>42</sup> This claim to a six-mile limit appears now to be made only for the purposes of revenue protection and fishery regulation. For all other purposes, says Nys,<sup>43</sup> the three-mile limit is the general rule.

*Russia*—at least, for purposes of war and neutrality—claims as territorial the whole of the waters of the White Sea, whose entrance is more than sixty miles in width. Aubert<sup>44</sup> quotes Russian Admiralty Instructions of 1893, in which the territorial limits of this bay are given, *vis.*, southwards of a line drawn, at a distance of three miles, between Siratoi-Noss (a headland on the northeast coast of the peninsula of Kola) and Kanina-Noss (the northwest extremity of the peninsula of Kanin). The distance between these two points is, he says, more than a degree of latitude.

Of International Conventions in which the extent of jurisdiction in wide bays is stipulated, I may again refer to the Fishery Convention between Great Britain and France of 1839.<sup>45</sup> It was therein provided that the rights of fishing in a zone extending three miles seaward from low-water mark on the coasts of the contracting States should be exclusively reserved to the subjects of the respect-

41. *Elementos de derecho publico internacional*, i., p. 23 (1849); quoted in the *Report* (p. 114). A Customs Ordinance of November 19th, 1884, authorizes the exercise of Customs jurisdiction . . . "as regards the coast, from the moment when a vessel enters the jurisdictional waters of Spain, which extend to six miles, equivalent to 11.111 kilometres from the coast."

42. Wheaton (ed. Atlay, 1904), p. 227) refers to protests on the part of Great Britain and United States which are later in date than Riquelme's work. Thus, during the American Civil War, the United States refused to recognize the six-mile limit in regard to the neutrality of Cuba (see Note, Mr. Seward to Mr. Tassara, August 10th, 1863). Wharton's *Digest*, i., p. 103, Section 32. In 1874, Lord Derby intimated to the Spanish Government that their pretensions would not be submitted to by Great Britain, and that any attempt to carry them out would lead to serious consequences. *U. S. Dip. Corr.*, 1875, p. 641. Mr. Fish also stated, on the part of the United States Government, "We have always understood and asserted that, pursuant to public law, no nation can rightfully claim jurisdiction at sea beyond a marine league from its coasts." Wharton's *Digest*, i., p. 105, Section 32.

43. Nys, *Droit Int.* i., p. 511.

44. *Rev. gén. de Dr. Int. Pub.* 1894, p. 440.

45. *Hertslet, Com. Treaties*, v., 86.

ive States. With regard to bays, Section 9 provided as follows:—"It is equally agreed that the distance of three miles fixed as a general limit for the exclusive right of fishing upon the coasts of the two countries shall, with respect to bays, the mouths of which do not exceed *ten miles* in width, be measured from a straight line drawn from headland to headland." This stipulation was repeated in Art. 1 of the Fishery Convention between the same countries of 1867.<sup>46</sup> In the case of the Bay of Cancale, between Cape Carteret and Point Meinga, in Brittany (seventeen miles wide), an express reservation of exclusive fishing rights is stipulated for France by both Conventions.

The North Sea Convention of 1882 for the regulation of the police of fisheries in the North Sea outside territorial waters contains a clause with reference to bays which corresponds to that in the Anglo-French Convention of 1867, but is framed in more precise terms.<sup>47</sup> The Convention contains a conventional delimitation of the North Sea south of the 61st degree of north latitude, and provides *inter alia* that on the west it is bounded by the east coasts of Great Britain and Ireland. After providing that the fishermen of each country shall enjoy the exclusive rights of fishing within the distance of three miles from low-water mark along the whole extent of the coasts of their respective countries, as well as of the dependent islands and banks, Article 2 of the Convention goes on to say:—

"As regards *bays*, the distance of three miles shall be measured from a straight line drawn across the bay, in the part nearest the entrance, at the first point where the width does not exceed ten miles.

"The present Article shall not in any way prejudice the freedom of navigation and anchorage in territorial waters accorded to fishing boats, provided they conform to the special police regulations enacted by the Powers to whom the shore belongs."<sup>47</sup>

A similar provision is contained in the subsequent Convention concluded between two of the signatories, Great Britain and Denmark on 21st June, 1905, with reference to the fishing off the Faroe Islands and Iceland which lie north of the 61st degree of latitude.<sup>48</sup>

By Treaty between Spain and Portugal<sup>49</sup> (subsequent in date to

46. Martens, *Nouv. Rec. Gén.*, xx., 465.

47. *Procès-verbaux in Parl. Papers* (3238), 1882; also Martens, *Nouv. Recueil Gén.*, 2nd Series, IX, 505. The date of the Convention is May 6th, 1882, and the signatories are Great Britain, Germany, Belgium, Denmark, France and Holland. See Martens, *ut sup.*, 556.

48. Five Treaty Series, 1903, No. 5; *Archives Diplomatiques* (1903) 3-ième sér. Tom. 86, Parts 5 and 6, p. 1.

49. Quoted by Professor Torres Compos in the *Report*, p. 93.

the North Sea Convention), as regards the police regulations of coast fisheries (*reglamento de policia de la pesca costanera*), signed at Madrid on October 2nd, 1885, it was provided that the limits within which the general right of fishing is reserved exclusively to fishermen, subject to the respective countries (*juridicciones*), is six miles measured from low-water mark. For bays whose entrance does not exceed twelve miles, the six miles are measured from a straight line drawn from one side to the other. The miles referred to are geographical miles of sixty to the degree of latitude. In this treaty no addition is made, as in the North Sea Convention, to double the territorial limit at the entrance, but the ordinary limit is the six miles customarily claimed by Spain, which of course is itself double that of the North Sea Convention. The clause is exactly that recommended by the Institute's Paris Resolutions.

Several of the States which signed the North Sea Convention have expressly adopted in their domestic legislature the ten-mile limit for bays. Thus in 1888 *France* enacted a law<sup>50</sup> prohibiting foreign vessels from fishing in the territorial waters of France and Algeria and in defining the limits of these waters she adopted almost textually the provisions of the Convention. It is interesting to note that this legislation applies to French waters other than those which border the North Sea of the Convention. *Belgium* and *Holland*<sup>51</sup> have each followed the example of France in excluding foreign vessels from fishing within the exclusive fishery limits. The Belgian law of August 19th, 1891, is expressly based on the stipulations of Articles 2 and 3 of the North Sea Convention of 1882, which it embodies. For fishery purposes, therefore, the ten-mile limit is applied to Belgian bays. I have not been able to ascertain whether the Dutch law of October 26th, 1889, takes the same course, but the remark of De Lapradelle leads me to suppose that it does.

There is evidence, therefore, that the ten-mile limit for bays which has been adopted in international conventions is making headway also as a national limit for fishery purposes among certain States which do not possess a coastline of great incurvations. There is, however, little likelihood that it will find general acceptance among States with a coastline of different configuration. If, for instance, the eastern coast of the British Isles had been as serrated

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50. Clunet, *Journal de Droit Int. Privé*, XIII, 126; See State Papers (Great Britain) Vol. lxxix, p. 232, for the French Decree delimiting, under this law, the bays in Algeria in which exclusive fishery rights are claimed for French nationals.

51. De Lapradelle, *La Mer Territoriale*, p. 45.

as the west coast of Scotland, Great Britain, one may be sure, would not have agreed to the conventional delimitation of the German Ocean by the North Sea Convention.

In Great Britain attention has been drawn to this subject by the extensive claim to territorial jurisdiction over the Moray Firth, which the High Court of Justiciary in Edinburgh in the case of *Mortensen v. Peters*,<sup>52</sup> declared to have been made by the Herring Fisheries (Scotland) Act of 1889. Although, according to the court, the claim was asserted only for certain specified purposes, yet it appears to be inconsistent, not only with the limits of territorial waters in the North Sea, as defined by and acquiesced in by Great Britain in the North Sea Convention of 1882, but also with a provision in a subsequent Statute of the British Parliament, the Herring Fisheries Amendment Act, 1895, to which I shall afterwards refer. It was only indirectly that an international issue was raised in the case, for the court considered that it had to deal purely with a question of construction arising on a clause in an Imperial Statute. But at least indirectly there was an international bearing, since the question at issue was whether a Statute creating an offence was binding on non-British subjects in what, but for previous statutory enactments, would undoubtedly have been held to be the high seas. The circumstances of the case were briefly these:—

The Danish master of the steam-trawler *Niobe*, registered in Sandefjord, Norway, was tried and convicted at the Sheriff Court, Dornoch (Cromartyshire), of having committed an offence under the Sea Fisheries Acts and Herring Fisheries (Scotland) Act, inasmuch as he had used at a place in the Moray Firth, five miles or thereby east by north from Lossiemouth, the method of otter-trawling which, by a by-law of the Scottish Fishery Board, is a method prohibited under penalty throughout the entire Moray Firth within a line drawn from Duncansby Head, in Caithness-shire, to Rattray Point, in Aberdeenshire. At the instance of the master, the case came on appeal before the High Court of Justiciary in Edinburgh, where it was elaborately argued before a full Bench, composed of twelve of the thirteen judges who form the Scots Supreme Court. The appellant's case was that the alleged offence, having been committed on a foreign vessel at a spot more than three miles from low-water mark on the Scottish coasts, was not cognizable by the Scots Court. Being a foreigner, he was not bound by a British Statute creating an offence in what was otherwise the high seas. These contentions were overruled by the court in a unanimous judgment by which the conviction was upheld.

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52. *Supra*, note 1.

For a proper understanding of the point at issue, it is necessary to give some account of the geographical features of the Moray Firth, and of the British Fishery Legislation affecting Scotland, on the construction of which the court had to give its opinion.

(1) The Moray Firth proper is the most important of the arms<sup>53</sup> of the sea running in a southwesterly direction into the mainland of Scotland on its northeast coast. So far as it can be said to have headlands, these are formed on the one hand by Tarbet Ness (in Cromartyshire), which divides it from the smaller Dornoch Firth, and on the other by Burgh Head, a headland on the northwest coast of Elgin. The distance between these headlands is about fifteen miles, and the total extent of the Firth from that entrance to the mouth of the Beaulie Firth, into which it merges at its upper end, is about thirty-one miles. This is the Moray Firth as it is usually designated on standard atlases and on the charts issued by the British Admiralty. But the area of water in question in *Mortensen v. Peters* was immensely larger, including the Moray, Cromarty, and Dornoch Firths, and extending seaward to a limit which had been laid down by a by-law of the Fishery Board for Scotland under powers delegated from Parliament.

This seaward limit can be readily appreciated on reference to a large scale map of Scotland, for it will then be seen that a straight line drawn in a southeasterly direction from Duncansby Head<sup>54</sup> (the extreme northeast point on the mainland of Scotland, Caithness-shire) to Rattray Point,<sup>55</sup> on the east coast of Aberdeenshire (north of the seaport town of Peterhead), encloses a stretch of water forming, roughly, an equilateral triangle, its base being on the north coast-line of the counties of Aberdeen, Banff, and Elgin. The line between Duncansby Head and Rattray Point represents a distance of some eighty geographical miles, and the area enclosed by it to the westward is close on two thousand square geographical miles. Now it is this immense area of water which the High Court of Justiciary, interpreting a clause in an Act of Parliament, has declared to be (at least for certain purposes) within the territorial jurisdiction of Great Britain. It is plain, from the map, that the

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53. The others are the Cromarty Firth, an entirely land-locked bay, lying to the northwest, with its entrance in the Moray Firth; and the Dornoch Firth, a true bay, lying to the north, and separated from the Moray Firth by Tarbet Ness.

54. Approximately in longitude 30 degrees, 59 minutes west of Greenwich, latitude 58 degrees, 38 minutes north.

55. Approximately in longitude 2 degrees west of Greenwich, latitude 57 degrees, 27 minutes, 30 seconds north.

waters to the west of this line enter a coast-line of peculiar configuration, which only by stretching language can be called a bay. They include, as we have seen, two smaller areas of water, to which the term is not inappropriate, viz., at the western end of the triangle, the Moray Firth proper and the Dornoch Firth. But the headlands between which the line is drawn cannot reasonably be called the entrance to the statutory Moray Firth. Duncansby Head is simply the point at which the coast-line, after trending to the northwest, turns sharply to the west. Rattray Head, so far from being a headland in this connection, is actually to the south of Kinnaird Head, which, on the principle underlying the choice of Duncansby Head, might serve as the western headland to the bay. It happens, however, to be the first land which an imaginary line drawn southeast half east from Duncansby Head would touch on the Aberdeen coast. The waters<sup>56</sup> enclosed by this line are not then properly comparable with those of any of the bays mentioned at an earlier part of this paper, *e. g.*, Cancale Bay, Bay of Conception, or Delaware Bay. They bear most resemblance to the Bristol Channel, of which a description has already been given.

Let me now refer to the Fishery Legislation<sup>57</sup> leading up to the Acts which the Court was called upon to construe.

The first definition of the coasts of Scotland is given in the Herring Fishery (Scotland) Act, 1867 (30 and 31 Vic., c. 52), Section 11 of which provides that this expression, as used in the Act, "shall mean and include all bays, estuaries, and arms of the sea, and all tidal waters within three miles from the mainland or adjacent islands."

No innovation in the definition of Scottish territorial waters was made by the next Act, the Sea Fisheries Act, 1883 (46 and 47 Vic., c. 22), which, as regards Great Britain, carried into effect the pro-

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56. And their extent has not escaped even judicial comment, for in an earlier case before the same court (in which no question of the right of foreigners arose), the statutory Moray Firth was referred to "as a very extensive space . . . which includes the Moray Firth, but extends very much beyond what can properly be considered as a firth, and includes part of the ocean at a great distance from the shore," per Lord Kincairney in *Green v. Leith*, 23 *Court of Session Reports*, 1896, 4th series, vol. xxiii., *Justiciary Cases*, p. 50, at p. 54; and, again, "as a part of the sea of vast extent, and extending far out into the practically open sea for a considerable number of miles." Per Lord Justice Clerk Kingsburgh, *Wilson v. Rust*, *loc. cit.*, p. 56 at p. 65.

57. These Acts may be conveniently referred to in the *Manual of the Sea Fisheries (Scotland) Acts and Statutory By-laws*, issued by the Fishery Board for Scotland, 1901, C. D. 428. Price 1s. 2d.



visions of the North Sea Convention, 1882. By this Statute certain things were declared (Section 4) to be offences "within the exclusive fishery limits of the British Islands," and these limits were defined (Section 28) in general terms to mean "that portion of the seas surrounding the British Islands, within which Her Majesty's subjects have by international law the exclusive right of fishing, and where such portion is defined by the terms of any convention, treaty, or arrangement for the time being in force between Her Majesty and any foreign State, includes, as regards the sea fishing-boats and officers and subjects of that State, the portion so defined." In this Act, therefore, there was nothing out of which a claim to jurisdiction in territorial waters could be made save on the principle of international law, or by the terms of convention.

The next Act—the Sea Fisheries (Scotland) Amendment Act, 1885—conferred important powers on the Fishery Board of Scotland. It empowered that body to issue by-laws (for the validity of which certain formalities and procedure were prescribed) to restrict or prohibit any method of sea-fishing in any part of the sea adjoining Scotland, and within the exclusive fishery limits of the British Islands, where such mode of fishing was, in the opinion of the Board, injurious to any kind of sea-fishing within such port. It was provided that the Board might make similar restrictions, or prohibitions, to enable it to make experiments. As this Act was to be read and construed along with that of 1883, no alteration was made by it in the definition of the exclusive fishery limits of the British Islands.

In 1889, however, an Act was passed which, at least in one particular, legislated for waters outside the exclusive fishery limits, as defined by the previous Statute. This was the Herring Fishery (Scotland) Act, 1889 (52 and 53 Vic., c. 23), which had been passed at the instance of the line fishermen to protect them against the damage which was believed to be caused by the steam-trawlers. The Act contained a general prohibition against beam or otter-trawling, not only within three miles of low-water mark of any part of the coast of Scotland, but also in a list of waters which was specified in a schedule to the Act, save only between such points on the coast, or within such other defined areas as might from time to time be permitted by by-laws of the Scottish Fishery Board. The Board was therefore empowered to open parts of the waters which by the general prohibition were closed.

The schedule specifies waters which, for the most part, are on the west coast of Scotland, but at the end enumerates also certain

firths and bays on the east coast. Among them is the upper part of Moray Firth.

This Act also contains in Section 7 the explicit provision with regard to the Moray Firth, on which the case under discussion turned. It runs as follows:—

(1) *The Fishery Board may, by by-law or by-laws, direct that the methods of fishing known as beam-trawling and otter-trawling shall not be used within a line drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeenshire, in any area or areas to be defined in such by-law, and may from time to time make, alter, and revoke, by-laws for the purposes of this section, but no such by-law shall be of any validity until it has been confirmed by the Secretary for Scotland."*

In 1892 the Fishery Board exercised the powers conferred on it by this section, and on 27th September issued a by-law (No. 10) which was approved by the Secretary for Scotland on 22nd November, and by which the entire area, as defined in the section, was closed to beam or trawl fishermen.

The validity of this by-law was challenged in 1896 in the case of *Green v. Leith*, above referred to, on the ground that the Fishery Board was entitled to close only one area or more within the specified limit, and could not, therefore, prohibit trawling within the whole of the waters enclosed by the line between Duncansby Head and Rattray Point. This view was upheld by the Court of Justiciary when that case came before them on appeal, and a conviction obtained against a British trawler for an offence obtained under this by-law was quashed. But in the almost immediately subsequent case of *Wilson v. Rust*<sup>58</sup> the same court reconsidered the validity of the by-law, and by a majority of five judges to two sustained it on the neat ground that the whole area was within, because none of it was without, the defined limit between the two headlands.

It was moreover pointed out that the word "area," as used in clause 7, was a neutral term, in no way implying an antithesis to the whole.

The effect, then, of this decision was to close the entire Moray Firth, as defined by the by-law, to trawling vessels registered in Great Britain. To escape the restriction thus imposed, it is understood that the British owners of such vessels caused them to be registered in foreign countries, *e. g.*, in Norway, in the belief that to vessels flying a foreign flag the restriction would not apply. This

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<sup>58</sup> February 27th, 1896, 23 *Court of Session Reports*, 4th series (Justiciary Cases), p. 56.

expedient proved successful, for until recently the Scottish Law Officers of the Crown held the opinion that the by-law could not be enforced against foreigners. Owing to the agitation caused by the British fishermen, who were chagrined to find that the waters from which they were themselves excluded were becoming a close preserve for foreign trawlers, the whole question was reconsidered, and in 1904 a prosecution was raised against a foreigner, Olsen, the Norwegian master of the steam-trawler *Catalonia*, registered in Stavanger, Norway, for fishing by the prohibited method within the *Dornoch Firth*, at a point four miles southeast from Brora Point, contrary to By-law No. 2 of the Fishery Board, by which beam or otter-trawling at the place in question was prohibited. In the Sheriff Court of Dornoch the judge sustained Olsen's plea of no jurisdiction, based on the averment that the *Catalonia*, being registered in Norway, and Norway not being one of the Powers signatory to the North Sea Convention of 6th May, 1882, the master was not subject to the jurisdiction of Dornoch Sheriff Court. Under reservation of this plea the alleged offence was proved, but on an appeal at the instance of the Procurator-Fiscal the High Court of Justiciary sustained the jurisdiction of the Scots Court.

The judges held that the prohibition in Section 6 of the Herring Fishery (Scotland) Act 1889, being quite general in its terms, applied equally to British subjects and foreigners, and that it was not for the courts to draw a distinction which Parliament had not seen fit to make. Lord Kyllachy was unable to see that any question of jurisdiction in territorial waters arose in the case, since the *locus* of the alleged offence was "well within the three-mile limit as generally interpreted, and particularly within the definition of that limit expressed (I think in entire consonance with international law) by Article 2 of the International Convention of 1882."<sup>59</sup> The view of the court, therefore, was that Parliament had not exceeded any rule of international law by enacting a prohibition for the Dornoch Firth, which was a bay less than ten miles wide at the entrance, as defined by Section 2 of the North Sea Convention, and that the prohibition must apply to any person, whether subject or alien, within that bay, or within three miles seaward of the line connecting the headlands.

But in the next case, *Mortensen v. Peters*, the facts of which I have already stated, it was impossible to apply to the *locus* of the offence the rules of the North Sea Convention as to territorial

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59. *Peters v. Olsen*, 7 *Court of Session Reports*, 5th series (Justiciary Cases), p. 86 at p. 93.

waters. The place mentioned in the complaint is "five miles east by north from Lossiemouth" (a fishing village on the coast of Elgin). It was therefore outside the three-mile limit, measured from low-water mark. Moreover, Lossiemouth is about ten miles to the east of Burgh Head, the headland on the Elgin coast forming the east entrance to the Moray Firth proper. But as the place was undoubtedly within a line drawn between Duncansby Head and Rattray Point, the case raised in the clearest way the question whether a prohibition enacted by Parliament applied to foreigners when within this area.

The argument for the appellant was based on the fundamental proposition that as the offence in question was created by municipal statute, it conferred jurisdiction only over British subjects and over foreigners within British territory. A prohibition against an act committed by any person meant "any person over whom the courts have jurisdiction." Our legislation is primarily territorial. It can in no case apply to foreigners outside British territory. Now the appellant was a foreigner, and it was submitted that he was not within British territorial waters when he was alleged to have contravened the by-law. By international law territorial jurisdiction ends at the three-mile limit, with the exception of bays *intra fauces terra*.<sup>60</sup> There was no case in which a bay eighty miles wide has been held to be *intra fauces terra*. So far as any width is laid down as a limit the maximum is ten miles. *Intra fauces terra* implies something narrow—a land-locked bay such as can be defended from the shore. The Moray Firth, as defined by the by-law, does not satisfy the requirements of any of the writers as to *intra fauces terra*. There was no evidence that these waters have ever before been claimed as territorial, and, of course, no evidence that they had become so by acquiescence in that claim. In the North Sea Convention the North Sea is defined so as to include the Moray Firth, and the Convention admits that the waters therein dealt with are outside territorial limits. If the appellant here had been a subject of a power signatory to that Convention, and were claiming his rights under the Convention, the court would not construe the Statute so as to make it at variance with the Convention. The court could not construe it differently according to the nationality of the accused. It was not the law of Scotland that all waters within a line drawn from headland to headland are territorial. All that Stair<sup>61</sup> says is that bays are capable of being declared territorial.

60. *Lord Advocate v. Clyde Navigation Trustees*, 1891, *Court of Session Reports*, 4th series, p. 174.

61. James Dalrymple, Viscount Stair (1619-1695), was president of the Court of Session 16 -1671. His *Institutes of the Law of Scotland*, published

For the Crown, on the other hand, it was argued that in the construction of the Statute there was no room for the presumption as to the exclusion of foreigners, inasmuch as it was clear and unambiguous in its terms, and related to an area specified and defined.

5.—To return to the several kinds of Real Rights, the first is that of Community which all men have of things which cannot be appropriate. . . . Thirdly, the vast ocean is common to all mankind, as to Navigation and Fishing, which are the only uses thereof, because it is not capable of bounds; but when the sea is enclosed in Bays, Creeks, or otherwise is capable of bounds or meeths as within the bounds of such lands or within view of such shores, there it may become proper, but with the reservation of passage for commerce as in the land.

The presumption was important only where the territory affected was undoubtedly not British. Where it was clearly or even *in dubio* British, the presumption did not apply. The appellant's argument from the limits of the North Sea as given in the Convention failed because those limits were agreed to only for the purposes of that Statute which were quite different from those of the by-law under discussion. Further, the Moray Firth is part of British territorial waters on the principle that all waters are territorial which are included within a line drawn from headland to headland. It is not a valid objection that the application of the rule here included a great amount of water. The only limit on the assertion of territorial rights is that no more is to be claimed than is reasonably necessary for the protection of the country's interests. Finally, even if the Moray Firth is not for all purposes territorial, Great Britain may make police regulations with regard to it in order to regulate the fishings.

The leading opinion of the High Court of Justiciary was delivered by the Lord Justice General (Lord Dunedin), who treated the question before the court as one purely of construction. The court, he said, had nothing to do with the question of whether the legislature had or had not done what foreign powers might consider a usurpation in a question with them. They had merely to give effect to a Statute of the British Parliament. The argument for the appellant as to the presumption against Statutes creating offences applying to foreigners was not conclusive, because the presumption might be redargued (rebutted). The question was whether it had been redargued on this occasion. In favor of an affirmative view was the strong inference to be derived from the terms of the prohibition

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in 1681, was the first treatise on the Law of Scotland, and is still of the highest authority. 4th edition, 1826 (ed. Brodie). The passage referred to is from Book II, Title I, "Rights Real or Dominion, wherein of Community, Possession and Property."

in question. It was not an absolute prohibition against doing a certain thing, but a *prohibition against doing it at a certain place*.

"Now," he went on to say, "when a legislature using words of admitted generality, 'it shall not be lawful,' etc., 'for persons who,' etc., conditions an offence by territorial limits it creates, I think, a very strong inference that it is for the purposes specified assuming a right to legislate for that territory against all persons whomsoever. This inference seems to me still further strengthened when it is obvious that the remedy to the mischief sought to be obtained by the prohibition would be either defeated or rendered less effective if all persons whomsoever were not affected by the enactment. It is obvious that the latter consideration applies to the present case. Whatever may be the view of anyone as to the propriety or expediency of stopping trawling, the enactment shows on the face of it that it contemplates such stopping, and it would be most clearly ineffective to debar trawling by the British subjects while subjects of other nations were allowed so to fish."

His lordship next dealt with the argument that the *locus* of the occurrence in question was not touched by the Statute in so much as international law had formerly fixed it to be beyond the limits of territorial sovereignty. There was, he said, no such thing as a standard of international law extraneous to the domestic law of a kingdom to which an appeal may be made. "International law, so far as this court is concerned, is the body of doctrine regarding the international rights and duties of States which has been adopted and made part of the law of Scotland." It was, therefore, relevant to inquire whether the *locus* in this case was beyond the limits within which the British legislature might enact a prohibition directed against all the world for the purpose of regulating methods of fishing. That within the three-mile limit the territorial sovereignty would be sufficient to cover any such legislation as the present, was not proof of the counter proposition that outside that limit no such result could be looked for. Moreover, the *locus* was admittedly within the bay known as the Moray Firth, which the Crown said was *intra fauces terræ*. Although there was no exact definition of this phrase, his lordship thought that three points might be referred to as going far to show that the *locus* here might be considered as lying *intra fauces terræ*. He quoted the passage already cited from *Stair* to show that according to the law of Scotland it might so be considered. Moreover, the Statute under discussion shows that claims were put forward to legislate in other places far beyond the three-mile limit, *e. g.*, the Firth of Clyde near its mouth; and, lastly, the decided cases of jurisdiction in wide bays supported the same conclusion.

"It seems to me, therefore," he said, in conclusion, "without laying down the proposition that the Moray Firth is for every purpose within the terri-

torial sovereignty, it can at least be clearly said that the appellant cannot make out his proposition that it is inconceivable that the British legislature should attempt for fishery purposes to legislate against all and sundry in such a place, and if that be so then I revert to the consideration already stated, which as a matter of construction makes me think that it did so legislate."

The argument from the terms of the North Sea Convention he considered to fail because that Convention did not deal with what was in dispute here, namely, a mode of fishing. The Act moreover created no privilege in favor of British subjects, which was in conflict with the Convention. Subjects and foreigners are *ex hypothesi* treated alike.

Lord Kyllachy, while admitting that on the point of construction there was always a certain presumption against the legislature of the country asserting or assuming the existence of territorial jurisdiction going clearly beyond limits established by the common consent of nations, pointed out that this presumption might be redargued for the purposes. Express words would of course be conclusive, and so would plain implication. In the present case he considered the presumption to be redargued by the unlimited and unqualified terms of the prohibition applying to a specified area, and further by the consideration that the plain object of the enactment would have been defeated if the prohibition were not construed to apply also to foreigners.

"Accordingly," he said, "it would be, I think, easier to suppose that the legislature had reached even an erroneous conclusion as to the extent of its jurisdiction, and had legislated accordingly, than that it had resolved deliberately to impose a futile restriction upon its own countrymen, and at the same time to create a hurtful monopoly in favor of foreigners."

He further pointed out that the presumption had never been applied except when the excess of jurisdiction was clear. The whole ratio of the presumption fell if it appeared that the area which was in controversy was at best only in the position of debatable ground, being in effect within a category as to which different nations had always taken more or less different views, and maintained different conclusions. On the question of international law, his lordship held that no evidence of any recognized and established rule on the territoriality of wide bays had been adduced.

When one bears in mind that the court was construing an Act of Parliament, it is difficult to see how in accordance with the rules of law prevailing in Great Britain it could have reached a different conclusion, for undoubtedly it is not the business of a British Court to decide whether an Imperial Statute does or does not contravene a

rule of international law. Whether in a question involving not statutory but common law it would have applied the *dicta* frequently expressed in earlier English and American cases, that international law is part of the law of the land, is a question which one must reserve until the case arises. To international lawyers the interest of this case lies less in the decision than in the legislation on which it turned. And here one cannot help feeling that the British Parliament, without perhaps being fully aware of what it was doing, has made, in reference to the Moray Firth, a claim to jurisdiction to which there is almost no parallel. The nearest claim is that made by Russia for purposes of war and neutrality over the White Sea, whose headlands are more than sixty miles apart, but other States are not particularly concerned with claims which a neighbor may make over waters within the Arctic Circle.

That this claim to jurisdiction over the Moray Firth was not made by Parliament in virtue of a settled principle in regard to wide bays is clearly shown by the Herring Fisheries Regulation (Scotland) Act of 1895, in which Parliament proved itself much more chary in legislating, even for the purpose of fishery regulations, over areas of the sea at a distance from the British coast. This Act by Section 10 empowers the Fishery Board to issue fishery regulations which shall be operative within thirteen miles of the Scottish coast,<sup>62</sup> but for their validity it lays down strict conditions on a principle for which Mr. Barclay, at the meeting of the Institute of International Law at Paris, endeavored, without success, to obtain recognition. As an addition to Article 2 of the Paris Resolutions he proposed the following amendment:—"Dans le cas où un état voudrait soumettre la pêche à des réglemens quelconques jusqu'à une distance plus grande que six milles de la côte, il faudrait l'assentiment des intéressés." This proposal was rejected. It was thought to be dangerous, as it might empower two States to put their heads together and establish all the sea virtually a *mare clausum*. Moreover, "intéressés" was indefinite. All peoples are "interested" in the freedom of the seas.

The Scotch Act, however, adopts this principle. It entitles the Fishery Board by by-law to direct that the methods of fishing known as beam-trawling and otter-trawling shall not be used in any area or areas *under the jurisdiction* of Her Majesty within thirteen miles of the Scottish coast to be defined in such by-law. The

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62. De Lapradelle, *La Mer Territoriale*, p. 56, erroneously gives the distance as *thirty* miles, and omits all mention of the conditions on which the validity of the by-law is made to depend.



waters opposite any part of the coasts of England, Ireland, and the Isle of Man within thirteen miles thereof are expressly excepted. The Act therefore relates purely to Scotland. As a condition to the validity of the by-law the Secretary of Scotland must hold a local inquiry in the district adjoining the part of the sea to be included in the by-law, at which inquiry all persons interested shall be heard, whether resident in the district or not, and notice of such enquiry shall be sent to all Committees of sea fishery districts in the United Kingdom. It is further provided that no area of sea within the said limit of thirteen miles shall be deemed to be under the jurisdiction of Her Majesty for the purposes of this section *unless the powers conferred thereby shall have been accepted as binding upon their own subjects with respect to such area by all the States signatory to the North Sea Convention, 1882.*

It seems clear that but for Clause 7 of the Herring Fishery (Scotland) Act, 1889, the Fishery Board could not subsequently to this Act prohibit beam or otter-trawling in the Moray Firth even up to thirteen miles of the Scottish coast without satisfying the conditions of enquiry by the Secretary of Scotland, and assent on the part of the signatories to the North Sea Convention as provided in the Act. It would, therefore, seem that since the passing of the Act of 1889 and before the Act of 1895 the mind of Parliament had changed with regard to the extent of its jurisdiction in Scottish waters.

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## CORPORATION LAWYERS

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It will be remembered that Jack Cade, as depicted in the second part of *Henry Sixth*, act iv, scene 2, had his programme of reform. He promised that seven half-penny loaves should be sold for a penny; and the three-hooped pot should have ten hoops; and it should be made a felony to drink small beer; and all the realm should be in common. And then Dick the Butcher makes a suggestion:

Dick: "The first thing we do, let's kill all lawyers."

Cade: "Nay, that I mean to do. Is not this a lamentable thing that of the skin of an innocent lamb should be made parchment? that parchment being scribbled over should undo a man?"

The souls of Jack Cade and Dick the Butcher are still marching on, and demagogues and yellow journalism make just as absurd promises to ignorant hearers and readers, and generally wind up by abusing the lawyers. And as judges are lawyers, or at least ought to be, they come in for their share of diatribe whenever their opinions seem to be inconvenient to the demagogue or the editor. A few days ago a judge in Ohio made a ruling against the prosecution in a corporation case, on the ground that the "fundamental rules of evidence" required him so to rule; and a newspaper a thousand miles away in the southwest berated the judge, and declared that applying the fundamental rules of evidence in a case against a corporation would lead to a revolution. Curiously enough the journal in question is published by a corporation of the usual soulless sort.

A favorite method on the part of demagogues in attacking a political opponent is to call him a corporation lawyer, on the theory apparently that if a member of the bar, no matter how distinguished or upright, has been counsel of a corporation he is practically disqualified to hold office. This is a theory so grotesque that it hardly requires notice from any intelligent person. It is a theory that would have disqualified Jefferson, Hamilton, Jackson, Webster, Calhoun and Lincoln, as well as scores of other distinguished statesmen.

But we are often told that lawyers are in the habit of giving advice to corporations by which those corporations are enabled to evade the law. This is a much more subtle charge, and has imposed upon a good many well-meaning people. Man does not live by bread alone, but very largely on phrases; and the average layman is easily influenced by the phrases we are now considering. It

would seem to be time for members of the bar to deny such charges, and call for proof.

And there is no proof. Of course no one has in view the little shysters and calaboose lawyers who are found on the ragged edge of the profession, and who now and then are sent to the penitentiary. It may be safely affirmed that nine-tenths of our profession are honorable men, just as much so as nine-tenths of the doctors and clergymen. And it is of this respectable portion of the members of the bar that these charges are made. But proof there is none. The writer of this paper has been in practice for several decades, and has never known or heard of an instance where a lawyer belonging to the nine-tenths has give advice to a corporation to enable it to evade the law.

The cry against corporation lawyers is not new. It is only one form of expression on the part of unskilled laymen with respect to the learned professions generally. The hypocrisies of the priest and the pretenses of the physician, as well as the wiles of the lawyer, have been the object of attack for thousands of years. Martial, the satirist of the second century, has two epigrams in which he ridicules counsel in the Roman courts, and which are very modern in tone. We are told that Saint Ives of Brittany is the only lawyer who was ever canonized; and that each year when the peasants celebrate his fête day they sing a hymn with this refrain:<sup>1</sup>

Advocatus, sed non latro,  
Res miranda populo.

Which we may translate,

He was an advocate, but not a thief,  
A wondrous thing in popular belief.

And the same sentiment is found to-day among those who are either unthinking or perverse. They feel, or pretend to feel, that lawyers at the best are shady people, and constitute a kind of necessary evil. But such has not been the opinion of the great experts from early time. Long ago Celsus defined law to be the art of knowing what is good and just; and Ulpian, as quoted in the *Pandecta*,<sup>2</sup> commenting on this definition, says that "he speaks well who declares us to be the ministers of justice; and our profession is to know what is good and equitable, and to separate what is equitable from what is iniquitous, distinguishing the lawful from the unlawful." Long after our political bosses and yellow editors shall have been forgotten, the names of Papinian and D'Aguesseau and Erskine

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1. Eschbach, *Introduction Générale*, etc., p. 12.

2. *Dig. I, 1, 1.*

and Marshall and Kent, and such as they were, will be gratefully remembered as among the elect and precious of history.

But coming more closely to our topic, it must be admitted that corporations are entitled to have counsel, as much so as natural persons. The corporations that publish yellow journals have counsel. And corporations have a right to submit questions of law to such counsel; and it is the duty of counsel to answer these questions frankly and fearlessly without regard to the *dicta* of politicians and editors. The elementary rules of corporation law are comparatively simple and well settled. The trouble is with the interpretation and construction of statutes; and statutes on these subjects are being passed by the hundred. It is said that Hegel was once asked what he meant by a certain profound passage in an earlier work, and replied that he had really forgotten. And so many a legislator would be puzzled to define the meaning of some of his enactments. Corporations could hardly exist without taking expert advice as to the meaning, incidence and validity of such statutes. And yet if the counsel is of opinion that the statute in question does not apply or is, perhaps, itself invalid, the demagogue begins to chatter at once and to declare that such advice is given to enable the client to "evade the law."

It may perhaps be fairly said that there are five classes of cases in which corporations may most often require the advice or advocacy of lawyers.

In the first place, we have the ordinary routine of office work in which advice is given as to the conduct of current business. In this regard it would seem that a railway or industrial company has the same right as a corporation that owns a church or a college, or represents a city. There has been no complaint on this score even from the demagogues.

In the second place, advice may be asked more specifically as to the question whether the company thus applying to counsel is within the terms and scope of a statute. This of course may be of prime importance and must be decided without regard to public clamor. It may be assumed that this was the problem submitted by the American Sugar Refining Company to its legal advisers prior to the litigation in the case of the *E. C. Knight Co. v. The American Sugar Refining Co.*<sup>3</sup> Were the organization and business of the defendant in violation of the Sherman Act of July 2, 1890?<sup>4</sup> We may also assume that the counsel replied in the negative; and in the suit that

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3. 156 U. S. 1.

4. 26 Stat. p. 209.

followed both the lower courts and the Supreme Court of the United States decided that the advice was sound.

In the third place advice may be asked as to whether a statute is constitutional. Some years ago many state statutes were adopted on the subject of trusts and combinations. In Louisiana a very drastic act was passed, of this sort, but it wound up with this remarkable statement:<sup>5</sup>

"The provisions of this act shall not apply to agricultural products or live stock in the hands of the producer or raiser; nor be so construed as to affect any combination or confederation of laborers for the purpose of procuring an increase of wages or redress of grievances."

This clause rendered the act unconstitutional, because it denied the equal protection of the laws; and it has remained a dead letter for fourteen years.

In Texas there was a similar statute, infected with a similar vice, and it was declared invalid in the Circuit Court of the United States.<sup>6</sup>

In Nebraska a similar statute contained an exception as to associations of working men, and was declared invalid by the Circuit Court of the United States; and among other reasons because it denied the equal protection of the law to persons not members of labor unions.<sup>7</sup>

In Illinois there was a statute drawn on the same lines, and of equally drastic character, but to which some demagogue added these words: "The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

The Supreme Court of the United States held<sup>8</sup> that this exception caused the act to deny the equal protection of the laws and made it null and void. Were not counsel justified in so advising, prior to the suit? Yet, no doubt, there were people in Illinois who declared that these lawyers were helping a corporation to evade the law.

There is a statute of Congress known as the Erdman Act,<sup>9</sup> which, under the commerce clause of the Constitution, undertakes to prevent interstate carriers from keeping their employees out of labor unions. The United States Court at Louisville has recently declared, in the case of *U. S. v. Scott*, 148 Fed. 431, that the act was unau-

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5. Act No. 90, 1882.

6. *In re Grice*, 79 Fed. 627.

7. *Ind. Co. v. Cornell*, 110 Fed. 817.

8. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 556.

9. Act of June 1st, 1898, Section 10; 30 Stat. 428.

thorized because it was not a legitimate regulation of interstate commerce. Counsel probably gave a similar opinion in advance of the decision.

Congress has recently passed another act in virtue of the commerce clause,<sup>10</sup> in which the liability of common carriers engaged in interstate business for personal injury to employees is defined, and the doctrine of contributory negligence is annulled. Some counsel have already advised railway companies that the statute is not authorized by the power to regulate commerce between the states. In brief, they claim that because a corporation is "engaged" in such commerce it does not follow that Congress has the power to regulate its acts and liabilities in matters which do not actually pertain to interstate commerce. They may be wrong in their theory, but it will hardly do to say that they are advising their clients so as to enable them to evade the law. They simply propose to ask the court whether the act is valid.

In the fourth place a lawyer may be called on to defend a corporation or its officers in a criminal cause; and when he does so there will be plenty of people to declare that here at least his function is to enable his clients to evade the law. The newspapers will say so, of course, for they have the gift of prophecy; and they will condemn the defendant company before the prosecution is even instituted. While I write these letters an old commercial journal in New York is telling us that the United States is about to begin a criminal proceeding against a large company; that the company is plainly guilty; and that it has not a loophole of escape. This is an easy way to decide a case, but it is hardly in accord with Anglo-Saxon and American ideas of justice and procedure. It is generally considered that the meanest sneak thief or the vilest murderer is entitled to a presumption of innocence, to an orderly trial, and to the assistance of an advocate. A lawyer may properly defend a criminal whom he thinks to be guilty. In Paris, some time ago a different opinion prevailed. The bar there united in refusing to defend a person accused of an atrocious crime, on the ground that he was plainly guilty. After the poor wretch had been condemned and executed it was found that he was innocent. There are many reasons why a lawyer may defend a person who seems to have no real defense. The counsel may be appointed by the court, and be bound to act. The defendant may have confessed to a crime he never committed, for there are examples of that. Or, he may be insane. Or the witnesses for the prosecution may be in a conspiracy to

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10. Approved June 11th, 1906.

deceive. Or, as has happened, while an accused person is being tried for murder, and the evidence seems strong, the man alleged to have been murdered comes walking into court. The fact is that the honorable lawyer has the right, and it is often his duty, to defend a corporation accused of an offense. If he state the facts correctly and quote the law correctly, he has a right to apply that law to those facts in favor of his client with such skill as the Lord has given him. And it is a poor compliment to prosecuting officers and judges to assert that such a method of defense enables the client to evade the law.

In the fifth place a lawyer may be called on to defend a corporation in a civil suit; and this fact has been an abundant source of diatribe, especially in the matter of claims against carriers, and actions for personal injury; but the right of counsel to defend a civil suit is plain. No one but a yellow journalist can be perfectly sure of the facts and law of an important and complicated case before it is tried. We all agree that the Supreme Court of the United States is composed of learned and honest men, yet note how they disagree on points of law and fact. I take up at random a recent volume of the reports of that court. It contains forty-three opinions. In eight cases, or nearly twenty per centum, there was dissent. In two cases one justice dissented; in two others two justices dissented; in two others three justices dissented; and finally in two others four justices dissented. Moreover, we all remember the income tax case, the trans-Missouri traffic case, and the insular cases. When very learned men under the responsibility of a great official position can thus differ in regard to the meaning of human language, or even of a single word, the advocate may certainly take sides, in advance of a decision, in perfect good faith. In all important civil litigation there are two sides, and sometimes three or four. There may be honest differences of opinion as to either plaintiff or defendant, and an honorable lawyer may appear for either, provided he does so in accordance with the rules of ethics of the English and American bar. Litigation is a kind of warfare, but war has its laws, its rules of honor, its maxims of chivalry. We are to make war for our clients, but only in honorable ways. We are to state our facts correctly and we are to quote law correctly, and it is in the application of such law to such facts that the skill of advocacy is to be exhibited.

It is especially important that good lawyers should appear for the defense in personal injury cases. It is a melancholy fact, often noted; that there are at every bar certain black sheep, sometimes called "Ambulance Chasers," who promote litigation of that sort,

and are unscrupulous both in the institution of suits and the method of trial. And it is very necessary that they should be opposed by counsel of learning and character, to the end that the real facts and the true law may be brought out and applied.

Of course, my views on this subject may be erroneous, and may be the result of prejudice and prepossession in favor of the nine-tenths of the bar above mentioned. But I venture to express such views; and I would feel obliged to any one who would tell me of a concrete case where a decent counsel has helped a corporation to evade the law. In many cases, perhaps in a majority, where counsel have advised corporations, the advice has been sound. In many instances lawyers have advised corporations that a certain statute did not apply to their clients, and have been sustained by the courts. In other cases they have advised that this or that statute was invalid, and have been sustained by the courts. They have often defended corporations in criminal cases, and have had a perfect right to do so in accordance with the rules of ethics above cited. They have defended corporations in many civil cases, in accordance with the same rules, and have had a perfect right to do so. But demagogues are unscrupulous, and many other laymen are impatient of the orderly processes of law; and so these rightful acts on the part of counsel have been misconstrued into something wrongful.

*William Wirt Howe.*



## THE JUDICIAL SYSTEM OF THE BRITISH COLONIES.

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The consolidation in 1901 of the six Australian colonies into a federation of states known as the "Commonwealth of Australia" and the establishment of a political and judicial system in that Commonwealth modeled in its chief provisions upon the Constitution of the United States has given students of politics a fresh opportunity for the observation in practice of the principle of federation, and should stimulate all who are interested in the study of comparative governments to an examination not only of the workings of the Australian Commonwealth, but also of the political and the judicial structures of the other important British colonies throughout the world.

To the lawyer, especially to the lawyer who is ambitious eventually to become a jurist, a study of the judicial system of all governments administering the common law and civil law is of inestimable advantage. Moreover, a knowledge of the institutions of other countries is at once interesting in itself and broadening to the student who has the patience to search for and to acquire the information.

In England the great body of rules which we know as the common law was developed; from England this body of common law has been carried to most of the colonies which England has founded or conquered, and it is today administered by judges who are following substantially the same precedents as obtain in the courts of the mother country and of the United States.

It is interesting to consider the wisdom of English statesmen in imposing a system of law upon a colony. In such colonies, for example, as the Australasian colonies where an inconsiderable aboriginal population was found and where no formal code of law acceptable to Englishmen prevailed the common law was introduced. In other colonies which had been under the governmental control of European countries where the civil law was in force, such as British Guiana, Cape Colony, Ceylon, Mauritius and Quebec, England upon taking possession deemed it wise and necessary to continue and to maintain the existing

code of law. We find, therefore, that in a number of the British colonies the civil law prevails,—either the civil law based upon the Code Napoléon, as in Quebec and Mauritius, or the civil law as modified and interpreted by the Dutch jurists and known to students of comparative jurisprudence as the Roman-Dutch law.

In the Commonwealth of Australia and in the several States which compose that Commonwealth the common law obtains with no admixture of native laws and customs. But in a number of minor colonies, as well as in the British possessions in India, where there is a large or predominant native population it is necessary to recognize the usages and customs of the natives in any controversies to which the natives may be parties. In the colony of Natal in South Africa, for example, where the Roman-Dutch law was brought in by the Dutch settlers and continued by the British when they acquired Natal, that code of law still regulates the rights of the European population, but the native Zulus and other aboriginal peoples are governed by their own native laws and conventions, if reasonable, and in civil and criminal cases arising out of native customs they are judged, so far as it is possible and proper, by their own tribal rules and usages. In the main, however, the British colonies can be divided into the colonies administering the common law and those administering the civil law. The colonies in which the common law obtains are the more numerous and the more important. Indeed in the colonies where the civil law prevails the civil law has been in many instances modified by the courts and by colonial acts and ordinances in the direction of common law rules.

This condition is best illustrated by citing the colony of Ceylon. Ceylon though known to the Greeks, the Romans and the Venetians, was settled by the Portugese, who were subsequently dispossessed by the Dutch. As the civil law was the law of the Netherlands, the Dutch conquerors imposed their own system upon Ceylon. When the English took over Ceylon in 1795, they very wisely permitted the pre-existing code to continue. The tendency of the English judges, however, is towards the common law, and for that reason the system of law prevailing in Ceylon where the judges of the highest court are and have been mainly English is a kind of composite of the common law and the civil law with some admixture of native law and customs. The well known Indian Penal Code framed by Lord Macaulay has furnished the foundation for the Ceylon Penal

Code. Codes of civil and criminal procedure based upon the Indian codes are now in force in Ceylon as well.

The Constitution of the Australian Commonwealth, as has been said, was based in broad outline upon the Constitution of the United States. The Commonwealth of Australia is a federation of colonies which, before the federation, were for all practical purposes autonomous. The Constitution of the Commonwealth is an act of the Imperial Parliament in England, but it is amendable by the Australians themselves without the necessity of applying to the British Parliament for permission to amend. A nominal right of approval of any amendment is, however, reserved to the Crown.

The Constitution provides for the creation of a court to be known as the *High Court of Australia* and of such inferior courts as the Parliament of the Commonwealth may deem necessary or proper to establish. In other words, the Commonwealth can create a complete judicial system of its own, just as Congress has done in the United States. Up to the present time, however, the Commonwealth Parliament has seen fit to establish only the High Court consisting of three judges and to grant to the judges of the State courts, in addition to their powers as State judges, jurisdiction in federal matters. As the Commonwealth increases in population a complete federal judiciary will undoubtedly be created.

The annual salary of the Chief Justice of the High Court of Australia, it may be well to add, is \$17,500 and that of each of the other justices is \$15,000.

Each component State in the Commonwealth has of course its own judicial system comprising a Supreme Court and subordinate courts. The number of the judges of the Supreme Court varies with the size and the importance of the State, but in every State the judges of the Supreme Court hold trial sittings as well as appellate sittings and they have jurisdiction both at law and in equity.

The plan prevailing in Australia, where judges of the State courts do trial and appellate work, obtains in most of the British colonies. There are courts in the British colonies, such as the Supreme Court of Canada, the judges of which conduct no trials, but the general rule, for reasons of economy in administration, is that all British colonial judges of the Supreme Court shall hold trial sessions of court and shall collectively hear appeals. It need hardly be added that no judge hears an appeal from a trial court of which he was the presiding judge. In at least one

American State (Vermont) the practice prevailing in the British colonies is still observed. Other American States, like New Hampshire, where this practice was once observed, have either modified their judicial systems to conform to present-day needs, or have completely changed them to the systems in force in New York and Massachusetts.

The salaries of the judges in the Commonwealth of Australia are somewhat higher than the salaries which the judges in the United States usually receive. The Chief Justice of the State of New South Wales receives the same salary as does the Chief Justice of the High Court of Australia, \$17,500, and each of the six puisne judges receives an annual salary of \$15,000. In the State of Queensland the Chief Justice of that State receives \$12,500 and each of the three puisne judges \$10,000. In Victoria the judges of the Supreme Court receive the same salaries as do the judges in New South Wales, and in the other Australian States, though the salaries of the judges are not quite so high, yet they are far higher than the average salary of an American judge of a superior court.

In Canada a somewhat anomalous condition of affairs prevails. In the United States and in Australia the federal government exercises only such powers as are expressly or impliedly granted to it by the Constitution, and such powers are subject to review by the highest court of the federation. In Canada, however, though the courts have the power to declare acts of the Dominion and the provincial parliaments unconstitutional and frequently exercise that power, yet the division of powers between the Dominion, or central government at Ottawa, and the various provinces is based upon a different theory from that upon which the constitution makers of the United States and Australia acted. The Constitutional act of 1867, under which the Dominion is governed, specifies the powers exercisable by the central government at Ottawa and those exercisable by each of the provinces of the Dominion. It also declares in substance that in case of any doubt as to whether the Dominion or the province has the power to act the doubt shall be resolved in favor of the Dominion government and that all powers not granted to the provinces in the Constitution are reserved to the Dominion. In other words, the Canadian Constitution allows the several provinces only such powers as are granted to them in the Constitution and reserves to the federal government all the remaining powers. The Constitution of the United States and the Constitution of the Commonwealth of Australia, however, grant to the

federal government only certain specified powers and expressly commit to each constituent State all the residue. An American State or an Australian State has plenary power through its legislature to enact any law which it may deem fitting to enact subject to the federal constitution and the constitution of the particular State.

Bearing in mind then this distinction, we can readily comprehend the Canadian polity and the difference between it and the American and the Australian.

Except for the minor courts in the several provinces of the Dominion of Canada all the judges of the Canadian courts, both provincial and federal, are appointed and paid by the Dominion government. Each province, however, may regulate the procedure and the organization of its own courts.

The highest court in the Dominion is the Supreme Court of Canada, which always sits at Ottawa and which is composed of a chief justice and of five associate justices. The annual salary of the Chief Justice is \$10,000 and that of each of his associates is \$9,000. At least two of the justices of the Supreme Court of Canada must be appointed from the bar of the French-speaking Province of Quebec.

The only other distinctly federal court is the Exchequer Court of Canada,—a court corresponding in jurisdiction to courts in the United States for the adjudication of claims against a State or the United States. The Exchequer Court of Canada and its several local divisions exercise admiralty jurisdiction as well.

The judicial system of the important Province of Ontario follows very closely, both in nomenclature and in practice, the English and the Irish court system. In the Province of Ontario the Supreme Court of Judicature consisting of a Court of Appeal and the High Court of Justice is obviously a reproduction of the English and the Irish courts bearing the same names. The Court of Appeal is composed of a chief justice and four associate justices, and it may sit in two divisions. The High Court of Justice is divided into four separate divisions; the Chancery Division, the King's Bench Division, the Common Pleas Division and the Exchequer Division. To each of these divisions three justices are attached; a chancellor and two associates in the Chancery Division, and a chief justice and two associates in each of the other divisions. Each of these divisions of the High Court has identical powers and jurisdiction, and the judges of all these divisions hold trial sessions of court both at law and in

equity in the chief towns of the Province. The Chancery Division is not necessarily restricted to the adjudication of causes in equity.

The judges of the High Court of Justice exercise appellate jurisdiction in what are known as "Divisional Courts," another obvious imitation of the English court nomenclature. These divisional courts are usually held by a chief justice (or chancellor) and by two other judges of the High Court assigned for that purpose. From a decision of a trial session of the High Court an appeal may be taken in certain cases direct to the Court of Appeal; in other cases to the Divisional Court and thence under certain limitations to the Court of Appeal. Thence if the case be important enough an appeal may be taken to the Supreme Court of Canada or to the Judicial Committee of the Privy Council in England as the appellant may elect.

There are, of course, in Ontario, courts of lesser jurisdiction than the High Court, such as the county courts and surrogate's courts in each county of the Province. Appeals from these courts are heard in the first instance in a divisional court.

In the Province of Quebec the Superior Court is the court of highest original jurisdiction in civil cases. From this court an appeal may be taken to three judges of that court who sit as the Superior Court in Review, a court somewhat like the Appellate Division in the State of New York. From the determination of the Superior Court in Review an appeal may be taken under certain circumstances to the Court of King's Bench, appeal side, a court which sits with no more than five judges in appeal cases. From the Court of King's Bench the persistent litigant may appeal, as in Ontario, either to the Supreme Court of Canada or to the Judicial Committee of the Privy Council in England.

In the other provinces of Canada successive appeals are not allowed with so much freedom. In Nova Scotia, New Brunswick, Prince Edward Island and the other Canadian provinces the judges of the highest court of original jurisdiction, usually called the Supreme Court, try cases individually and hear appeals collectively. There are no intermediate appellate courts of superior jurisdiction in any Canadian province except in the provinces of Ontario and Quebec.

It need hardly be added that in all the provinces of Canada there are courts exercising probate jurisdiction and also courts where suits for petty debts can be brought.

From this brief survey of Australian and Canadian judicial institutions one fact is singular and somewhat anomalous, the

fact that appeals may be taken direct from the highest State or Provincial Court to the Judicial Committee of the Privy Council without the necessity of exhausting the opportunity of appeal in the Commonwealth or Dominion. The explanation of this rather illogical right of appeal is found in the fact that before the union of the Australian colonies into the Commonwealth and the Canadian provinces into the Dominion the right to appeal to the Judicial Committee from each colony and province was allowed. After union it proved difficult to abrogate that right and therefore the right of appeal from the highest colonial and the highest provincial court to the Judicial Committee was preserved.

The common law prevails throughout the Dominion of Canada except in the Province of Quebec. In that Province, where the major portion of the population is French, the civil law based upon the Code Napoléon is in force, though that system of law has been materially modified, especially on its commercial side, by contact with English laws and customs. The civil law of Quebec has been codified and there is also in that province a Code of Civil Procedure.

The common law in the Dominion has of course been affected by statutory legislation, as in other common law countries, but though several codifying statutes relating to such subjects as banking, railways and insurance have been enacted, the common law has not been codified according to the notions of David Dudley Field and as exemplified in practice by the Civil Code of California.

Under the Constitution of Canada the Dominion Parliament has power over criminal law and procedure, and Parliament has, pursuant to that power, enacted a penal code and a criminal practice code for the entire Dominion. The inhabitants of the Province of Quebec take no exception to the right of the Dominion Parliament to formulate common law definitions of crime and to frame rules of criminal procedure. The reason for this acquiescence in the supplanting of the civil law by the common law is found in the fact that jury trials were absolutely unknown in French Canada prior to the English occupation, and the criminal law was there administered by the French, oftentimes harshly and capriciously.

In no province in Canada is a unanimous verdict of a jury required in civil cases, though the number of jurymen necessary to bring in a verdict varies in the different provinces. In criminal cases, however, the verdict of the jury must be unanimous before a defendant can be convicted.

In England, as is generally known among lawyers, the profession of the law is divided into two classes, that of barristers and that of solicitors or attorneys. Barristers are examined for the Bar by the Council of Legal Education of the four Inns of court and are subject to discipline by the Inn by which the barrister was called to the bar. Solicitors, however, are under the jurisdiction of the Law Courts and the Incorporated Law Society, a body entirely distinct from the Inns of Court. In England only barristers have the right to appear for trial or argument before the superior courts. The barrister is the trial lawyer; the solicitor is the office lawyer, and in no possible way can a solicitor practice as a barrister unless he renounces his office as a solicitor and is called to the bar in the regular way.

In Canada, however, though practicing lawyers are usually known as barristers and solicitors (as advocates in Quebec), yet the profession is not there separated as in England and there is no distinction in practice between a barrister and a solicitor, except that in some provinces a law student is admitted first as a solicitor and subsequently as a barrister. In most of the other colonies of the Empire there is really no practical distinction between the two classes in the profession, because a solicitor, as such, is not prevented from becoming a barrister if he chooses.

India presents a rather anomalous condition of affairs to the student of judicial systems. India is not regarded as a colony of the Empire and, is therefore, not under the supervision and control of the British Colonial Office.

India is populated by many different races and by representatives of many different languages and racial customs. Though governed by a Governor-General and Council, India is not precisely a federal State nor is it a unitary State. It partakes, in fact, of the nature of both.

India is composed of a number of states ruled directly by Englishmen and a number of feudatory states ruled by native sovereigns under British direction. In several of the states of India ruled directly by Englishmen, such as the Presidencies of Bombay and Madras, there is a supreme court, or High Court, as it is technically termed, and in addition, subordinate or magistrate's courts. The Chief Justice of the High Court of a Presidency is an Englishman, but there are usually one or more natives on the bench of a High Court. These natives are generally men of a high order of ability and learning, and they make very satisfactory judges. Their knowledge of native customs is invaluable to their English colleagues. Nearly all the



civil judges and the great majority of magistrates in the courts of original jurisdiction in India are natives.

Appeals may be taken from the High Court judge sitting at *nisi prius* or from the lesser courts to a divisional court or to the full bench of the High Court. Thence under certain limitations to the Judicial Committee of the Privy Council in England. There is, it is to be observed, no "Supreme Court of India."

In all courts of India where natives are parties to actions or proceedings native laws and customs, especially in family relations and in questions pertaining to inheritances, have the force of law. These customs are principally Hindu and Mohammedan usages which have been in existence in India for several hundred years. Where the native customs can play no part in the controversy or where it is not desirable that they should, English law prevails.

The criminal law of India was codified by Lord Macaulay after he went out to India in 1834 and was enacted into law in 1860. There is also a codification of the rules regulating procedure in criminal cases. The Indian Penal Code is justly regarded as one of the greatest and wisest achievements in codification, and it has, therefore, been followed in other states, notably in Ceylon and in the Straits settlements. Indian codifications of the law of evidence, contracts, negotiable instruments and several other branches of law have been successfully administered for many years.

In the native states of India the administration of justice is extremely untechnical and simple. In case of abuse of power the courts, however, are or can be supervised by the central government.

In a few of the very small and unimportant British possessions, like St. Helena and the Falkland Islands, the governor of the colony is the sole judge in the important cases. In Cyprus, an island which Great Britain occupies pursuant to a convention with Turkey made in 1878, Ottoman law is applied by the courts in cases where the defendant or both parties are Turks. In several other colonies owing to lack of sufficient court business the judicial system is not highly organized.

In all the British colonies, however, the judges are usually appointed for life. They have ample salaries, they are men of character, ability and learning, and they administer justice honestly, fearlessly and impartially. Moreover, the right of appeal from colonial courts to the Judicial Committee of the Privy Council in all important cases assures the litigant that his

rights will be passed upon by judges of the highest eminence and character.

British rule in the colonies has been on the whole beneficial to the natives and satisfactory to the European residents. Great Britain's passion for efficient government has been nowhere better illustrated than in her colonies, and not the least efficient branch of her colonial administration are her courts and her judicial system.

*Raymond H. Arnot.*

## ADMISSION TO THE BAR IN NEW YORK.

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The standard of admission to the Bar is a matter of paramount interest, not only to students of law and to the Bench and Bar, but to the public, which, in the last analysis, must receive the maximum of benefit or injury therefrom. More lawyers are made annually in the State of New York than in any other state of the Union because it exceeds all other states in population and has the greatest number of students of law. For this reason a brief review of the history and present condition of the system which obtains in New York may be of interest.

### HISTORY.

In Colonial New York, prior to the establishment of "the Supreme Court of the Colony of New York" in 1691, which is the court referred to in our Code of Civil Procedure in fixing the jurisdiction of our Supreme Court, there was no distinct class of professional lawyers. The old records made mention of "attorneys" who appeared before the Assize Court, but they were not bred to the law, nor did they devote themselves to its practice exclusive of their occupations as merchants, mechanics, factors or dealers in real estate. In some of the colonies, notably in Massachusetts Bay, there was an intense prejudice against those who practiced law, and in the Nicholls Code of Massachusetts punishment by fine and imprisonment was provided against lawyers as "common barrators vexing others with unjust, frequent and endless law-suits." Neither the first Chief Justice nor any of the first Associate Judges of the Supreme Court of the Colony of New York was educated as a lawyer. James Wilson, one of the Justices who constituted the Supreme Court of the United States upon its creation, in a lecture upon Law delivered before the College of Philadelphia in 1790, at which President Washington and other distinguished personages were present, said: "In many courts—in many respectable courts within the United States—the judges are not, and, for a long time cannot be, gentlemen of professional acquirements. They may, however, fill their offices usefully and honorably, the want of professional acquirement notwithstanding."

### THE AMERICAN REVOLUTION.

And yet the irrepressible conflict over the rights of man between the colonies and Great Britain, without the influence of legal regula-

tion or authority, at the outbreak of the Revolution had raised up a race of giants in the Law and gave to our State and Nation such masterful lawyers as John Jay, George Clinton, Gouverneur Morris and the Livingstons.

In the New York Assembly of 1734 the power of the Crown to create courts without legislative sanction was denied after a debate in which clearly were enunciated the principles which found crystallized expression forty-two years later in the Declaration of Independence. In the year 1765 Lieutenant Governor Colden, writing to the Earl of Halifax, deplored the dangerous influence which the profession of the Law had obtained in the Province of New York. Edmund Burke in speaking of the American Colonies said: "In no country perhaps in the world is the Law so generally a study." To the American lawyer is due not only the promulgation, but the defense of the principles that made America a nation and thereby also preserved the rights of Englishmen in the Mother Country from invasion.

#### REGULATED ADMISSION TO THE BAR.

The creation of a body of lawyers up to this time had been spontaneous and in response to the demand of the hour to prepare for the great awakening of man to Freedom. With the adoption of the Constitution in 1777, however, the admission of members of the Bar was regulated by the provision that all attorneys, solicitors and counselors should be appointed and licensed by the court in which they were to practice, and should be governed by its rules and orders. In 1779 the Legislature suspended all licenses to plead or practice law granted before April 21, 1777, because of the Toryism of some members of the Bar, subject to restoration upon giving before a sheriff's jury satisfactory proof that the lawyer under suspension had been true to the American cause.

Although the Constitution of 1777 provided for rules to be adopted by the Supreme Court for admission of attorneys, it cannot be determined that such rules were adopted until the year 1797. It was then provided that candidates for admission as attorneys must have served a regular clerkship of seven years with a practicing attorney of the court, time not exceeding four years devoted to classical studies after the age of fourteen years, being accepted as a part of the required period of clerkship. Four years' practice as an attorney, subsequently modified to three, gave the right, *ipso facto*, to admission as "counsel," but a person admitted as counsel was not permitted to practice as an attorney. Similar rules governed the admission of solicitors in Chancery with the addition of a

provision in the line of modern requirements that the candidate should pass a satisfactory examination before the Chancellor, Vice Chancellor or other officer of the court as ordered by the Chancellor. In 1829 the rules were amended so as to require that an attorney should be admitted as counsel, not as "of course," but "if he be found to be duly qualified," thus extending the principle of examination as a test of fitness. In 1837 any portion of time, not exceeding two years, spent in regular attendance upon the law lectures in the University of New York was allowed to a law student in place of an equal amount of time in a clerkship. In 1845 this provision was extended to time passed in attendance upon law lectures at "Cambridge University or the law school connected with Yale College." Prior to the Constitution of 1846 the Legislature had passed an Act permitting admission to the Bar upon a diploma of the Albany Law School without examination.

Under the provisions of section 470 of the Code of 1852 the Supreme Court in the year 1858 made a rule requiring all applicants for admission to the Bar to be examined before the Court in General Term on certain specified days, "and at no other time or place," upon subjects designated by the court in its rule.

#### THE COURT OF APPEALS.

In 1871 the Legislature made the most drastic change in provisions for admission to the Bar which up to that time the history of the Bar in New York affords, in transferring the same to the jurisdiction of the Court of Appeals. Eleven years later the Court of Appeals fixed requirements for preliminary education and proof of character.

#### THE STATE BOARD OF LAW EXAMINERS.

By Chapter 946 of the laws of 1895, Section 56 of the Code of Civil Procedure, the Legislature authorized the appointment by the Court of Appeals of a State Board of Law Examiners for the purpose of inaugurating a system of thorough and uniform examination for the ascertainment of the qualifications of candidates for admission to the Bar. This Act marked the opening of a new era in legal education in the State. In the methods that now obtain "all things have become new," although far short of the end desired by all those who foster for the profession of the Law a high ideal. By the strict letter of the statute even the much desired uniformity of examination was made impossible for the reason that two examinations in each year are required in each of the four Judicial Departments, and there are but three examiners. It resulted that until the

year 1903 examinations were held in the Fourth Department on one day, and in the Third, Second and First Departments on the day following, requiring two sets of examination papers, each entirely different from the other, thus destroying all uniformity, because it is impossible to prepare two sets of different questions upon the same topics which shall be exactly equal in effect in ascertaining the degree of knowledge of the Law possessed by applicants for admission to the Bar. With the consent of the Court of Appeals and the concurrence of the Appellate Division of the First and Second Departments, the examinations for those Departments were consolidated in that year enabling the examiners to hold all examinations contemporaneously and upon the same papers, securing absolutely uniform examinations throughout the State.

Other defects in the system of admission have been partially remedied by the action of the Court of Appeals in formulating new rules which will become effective July 1, 1907. These rules make a slight change in requirements for obtaining a law student's certificate so far as the study of English and English composition are concerned, but require four years of high school work instead of three for an equivalent certificate as at present. A most important change in the rules is that scholarship and a successful completion of a law school course, and not mere attendance, and that not less than twelve hours a week of actual class work for thirty-two school weeks, are made conditions precedent to the completion of law school time as part of the student's course. A law student's clerkship has been made definite by requiring proof of attendance in a law office during business hours for a fixed period while doing law office work under the direction of an attorney.

The Court of Appeals has failed to do that which it will do eventually in deference to the demands of public opinion. The time will come when it will require that the period of study for college graduates be three years in common with other students, and if the Bench and Bar aided by the great body of students of law will unite in arousing public opinion the requisite preliminary educational qualification will be a college degree or its equivalent in the attainment of knowledge, and as a condition precedent to admission to the Bar, the character of each applicant will be subjected to a scrutiny which will be genuine and not perfunctory.

If a choice of qualification for admission to the Bar were to be made between higher preliminary education and more knowledge of Law and Practice, all members of the profession who have at heart its advancement would prefer the former to the latter, for the chief reason that it is not to be doubted that the higher educational

requirement will carry with it a higher standard of personal character.

But every one who as a lawyer or law student has at heart high ideals for the profession of the Law will be grateful that the Court of Appeals has applied a remedy to the abuse of the name of law school in that no longer a night or day school, with inadequate facilities and unheard of instructors, requiring but one and one-half hours of work per day for five days in the week during eight months, aggregating a little more than 200 hours, will be as effective in counting a law student's time as our schools of law which are worthy of the name, and the frequent evasions of the rule as to law clerkships approaching closely to the commission of fraud, will, at least, become more difficult. It is a subject for congratulation that it will no longer be less difficult to become a lawyer than to become a dentist or horse-doctor.

Close observation by the State Board of Law Examiners during the twelve years of its existence convinces that the new rules of the Court of Appeals will have a beneficent effect because of late the Law has lost rather than gained ground as a learned profession; weaklings try to enter the Law because entrance to that profession is less difficult than entrance into other professions. Higher preliminary requirements will elevate the moral tone of the profession by excluding the uneducated who can compete only by resort to questionable methods, and a higher standard of legal attainment for admission to the Bar will tend to limit the number of lawyers, fix a fairer competition and inspire the public with confidence in the profession.

#### LAXITY OF REQUIREMENT.

It is believed that the influence of New York in raising the standard of the legal profession will be felt throughout the Union and will correct the laxity that obtains in other states, in the matter of admission to the Bar.

This laxity is notorious in Indiana and is deplorable elsewhere. In Kentucky a candidate came up for admission before several judges, each of whom tried in vain to put some question which the applicant could answer. An attorney was finally authorized to conduct the examination but was unable to obtain any correct answer. The applicant was admitted on the ground stated by the court, that no one would employ him "anyhow." Not long ago the entire law class of the University of Louisville was presented to the court for admission to the Bar, and the question of qualification was covered by the announcement that they had all passed examinations satis-

factory to their instructors, and the consideration of character was duly met by the statement that none of the class "had ever fought a duel with deadly weapons either in the state or without the state *with a citizen of the state.*" Among the candidates for admission to the New York Bar in a recent examination was one who applied upon the ground of former admission and one year's practice in Kentucky. His papers showed that he had been admitted by the court in Kentucky before reaching the age of twenty-one years.

At a dinner given in honor of the late Hon. Thomas B. Reed upon his taking up the practice of law in New York, Mr. Reed gave his experience in gaining admission to the Bar of California when a law student in San Francisco. He and a fellow student in an office across the hall were applicants for admission to the Bar. One day a member of the Supreme Court called upon him and announced that he had come to ascertain his qualifications as a lawyer. The examination began at once with the question: "Is the Legal Tender Act constitutional?" Mr. Reed replied: "It is!" Said the justice: "I have just examined your friend in the other office and he says the Act is unconstitutional, but we need lawyers who are able to answer great constitutional questions so quickly, right or wrong. You are both admitted."

#### THE RESULTS OBTAINED BY THE BOARD.

Between January 1, 1895, when the State Board of Law Examiners began its work, and January 1, 1906, the total number of applications for examination received was 9,356, an average of 850 annually. The number examined in each year from 1900 to 1905, both inclusive, averaged 1113. The diversity in the number of applications from the number examined is due to the fact that many applicants have been examined and have failed from two to seven and even more times. During the period last mentioned the average number of applicants rejected each year was about twenty-five per cent of the number examined.

During the years 1903, 1904 and 1905 the Board examined 2,768 applicants. Of this number 852, or thirty per cent, failed. Those who had an exclusive law school preparation were 1024, or thirty-seven per cent. The number who had only law office preparation was 329, or eleven per cent. Those who had both law school and law office experience were 1084, or thirty-nine per cent, and 2369, or eighty-five per cent, did some law school work. Of the failures 260, or twenty per cent, were among those who had law school preparation only, and 157, or thirty-nine per cent, were of those whose legal education was obtained in law offices exclusively. This demonstrates that the student who has a law school training has a



double advantage over the student whose knowledge of the law is obtained in a law office. The number of those who had both law school and law office training and who failed was 269, or twenty-five per cent. The effect of desultory work in preparation for examination is thus shown, as the percentage of failures among this class of students is identical with the percentage of failures among all students, including those who had no law school training. Of the applicants examined 846, or thirty per cent, were college graduates and 1917, or sixty-nine per cent, were not. The failures among college graduates were about twenty per cent, and among applicants who were not college graduates, about thirty-four per cent, being a difference in favor of those who have proper educational preparation, of fourteen per cent. It is probable that a college education should be credited with a portion of the advantage already shown to exist in favor of a law school training because eighty per cent of college graduates who enter the Law obtain their legal education at law schools.

#### THE METHOD OF EXAMINATION PURSUED BY THE BOARD.

The method of examination which the State Board of Law Examiners pursues was adopted after a careful study of the methods obtainable not only in the more progressive states of the Union, but particularly in England and France. The object of the Board is to ascertain the fitness of the applicant to practice Law in the State of New York. No attempt is made to learn the student's knowledge of the Law in other jurisdictions or his ability to state rules of law which have become obsolete. No effort is made to obtain definitions or statements of abstract principles of law. It is assumed that ability to do this has been acquired by the student in the course of his preparation. The Board prefers to test the ability of the would-be-lawyer rightly to apply the principles of law to a supposed case and correctly and safely to advise a client upon certain stated facts. The questions, fifty in number, six upon Pleading and Practice, five upon Evidence and thirty-nine upon Substantive Law, twenty-five for each of the two sessions of four hours in length, are therefore put in the form of problems which are carefully prepared by one or another member of the Board and are reviewed and criticised by the other members of the Board, each being assigned a certain number of questions upon stated subjects, the subjects being changed in rotation from one examination to another. Every fact necessary to the solution of the problem is stated in the question; nothing is left to assumption or imagination.

In marking the papers only errors are noted and equal effect is given to all questions except three upon Pleading and Practice and the Constitution of the State of New York, which, when missed, are marked as half errors. In all questions where it is practicable, a reason for the answer must be stated. If a question is answered correctly and a wrong reason is given, the mark imposed is half an error. Every paper is carefully read by a member of the Board. No part of their work ever is deputised or delegated. No commission of which the writer has knowledge performs its duty more conscientiously or devotedly. To have seventeen errors results in rejection. This involves the necessity of correctly answering sixty-six and two-third per cent of the questions upon the basis of value heretofore stated.

If a reading results in rejection of an applicant his papers must be re-read by another member of the Board for the correction of any mistake which may have occurred in the first reading and marking, and mistakes are not impossible in view of the magnitude of the labor involved.

A large percentage of the failures of applicants for admission to the Bar is due to insufficient preparation upon these subjects, viz: Pleading and Practice and Evidence. In June of the year 1903, the Board examined 482 applicants. Care was taken to ascertain the exact percentage of failures in these subjects. The percentage of those who failed to answer correctly sixty-six and two-thirds per cent of the questions on Pleading and Practice was eighty-six per cent, leaving the percentage of those who correctly answered that proportion of the questions on that subject but fourteen per cent.

No more than forty per cent of the applicants correctly answered sixty-six and two-thirds per cent of the questions on Evidence leaving sixty per cent to swell the percentage of failures. If the percentage of errors in these subjects can be brought down to the average of other subjects, the percentage of rejections will be materially lowered. This matter has been called to the attention of instructors in our principal law schools to the end that they devise a method of correcting the defect, and whenever opportunity has offered law students have been urged by members of the Board to put forth earnest effort to overcome this obstacle to their admission to the Bar. But there has been little or no improvement. As a means to the desired end the State Board of Law Examiners have formulated, effective July 1st next, the following:

#### RULE VII.

The Board will divide the subjects of examination into two groups, as follows: Group 1, Pleading and Practice and Evidence; Group 2, Substan-

tive Law. Each applicant will be required to obtain not only the requisite standard on his entire paper, but also in Group 1 to entitle him to a certificate from the Board. If he obtains the required standard on his entire paper, but fails to obtain the same in Group 1, he will receive a pass card for Group 2 and will not be required to be re-examined therein. He will be re-examined in Group 1 at any subsequent examination for which he gives notice as required by these rules.

The present system is far from perfect. Its limitations are patent. But it has accomplished something in the cause of legal education. Its effect upon those who have failed to meet its requirements in one, two, three, four or even five or six attempts, is its most potent commendation. After grievous failures, denoting entire inadequacy of preparation, a large majority of those who thus have been forced to realize the causes of their failure and some of whom had never taken the study of law seriously, by dint of hard work and perseverance finally have acquired a knowledge of law which is creditable to them and will be of value to their clients.

After all, whatever the means of education vouchsafed to anyone seeking entrance to the legal profession, the ultimate question of success or failure in the acquisition of knowledge, rests upon individual effort. So, too, and even in a more marked degree, depends upon the individual, more than upon the teaching of any school, the attainment of character, that other requisite which in the making of a lawyer, must ever go hand in hand with knowledge, and without which the lawyer who possesses the highest learning will be poor indeed.

Our profession will be ennobled or debased in accordance with the standard created by the individuals who compose it.

*Frank Sullivan Smith.\**

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\*Late member of the New York State Board of Law Examiners.

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## A SIAMESE PENAL CODE.

The Siamese Government has appointed a High Commission to report on a draft of a penal code prepared sometime since by Judge Tokichi Masao of the Court of Appeals (Y. L. S., D.C.L. 1897). Judge Masao, who is also Legal Adviser to the Government, is one of the Commission. An English translation of the draft code has been published at Bangkok.

## BREACH OF MARRIAGE PROMISE—INCURABLE TUBERCULOSIS AS A DEFENSE.

The decision of the Supreme Court of Washington, in *Grover v. Zoak*, 87 Pac. 638, seems to present a striking instance of the encroachment of the judiciary upon the powers of the legislative branch of government. In that case it was held, on grounds of public policy, that a man was not liable for breach of a marriage promise when the woman was suffering from incurable pulmonary tuberculosis although he knew, at the time of the engagement, that she had the disease.

While the cause of action for breach of promise of marriage has, under conditions of American life, fallen into much discredit, yet such a right of recovery should be abolished, in any particular instance or upon the existence of any special circumstance, by legislation and not by judicial subterfuge. Broad questions of public policy and distinct progressive steps in public policy are matters that fall more properly within the

cognizance of a legislature than of the courts. It is for the legislature to determine what laws are required to protect and secure the public health, comfort, and safety; its determination, of course, subject to review by the courts where constitutional rights are involved. *In re Jacobs*, 98 N. Y. 98. In matters which are committed to the legislature, the courts have no jurisdiction. *Bradshaw v. City of Omaha*, 1 Neb. 16. The courts cannot usurp the powers of the legislature by decisions which in effect amount to enactment of laws and the exercise of legislative powers. *State v. Blasdel*, 4 Nev. 241.

Therefore, while the present decision seems open to objections because not strictly and properly within the powers of the judiciary, yet it may be justified on account of the fact that it is aided by certain legislation of the State of Washington recognizing the infectious nature of tuberculosis and providing elaborate and systematic precautions against the spread of the disease.

The court cites many cases, and the principle of them is well established, that a party to a marriage contract may break it upon discovering the existence of a disease that would render the marriage relation improper or dangerous, but in the principal case this doctrine is extended to hold that the contract may be abandoned although the existence of a incurable disease necessarily inimical to marital welfare was known at the time when it was made.

The following language from the opinion of the Washington court, seems, in view of the facts of the case as disclosed by the record, to be reasonable and sound, although it is clear that the doctrine of the case might easily be carried to extreme length:

"Counsel for respondent cite us to cases where a man, promising to marry a woman whom he knew to have been formerly unchaste, was held to be bound by such promise. Such a case and this are not analogous. There the man by his promise overlooks the former shortcomings of the woman, and it is a matter concerning him only. She would have the ability to, and presumably would, reform and become a good wife and worthy mother. This is to the advantage of society and not inconsistent with sound public policy, and the law should interpose no hindrance thereto. But a consumptive woman is physically incapable of becoming a healthful companion or the mother of healthy issue. It is not a condition that she voluntarily created or can change at will. The evils to follow her marriage could not be confined to herself and husband, but must of necessity concern and injuriously effect others. The nature and natural consequences of a contract of marriage are such that the state is of necessity a third party to and interested in every such agreement. Its interests forbid the enforcement of such a contract between parties physically incapable of making the married state beneficial to themselves or society. We are not disposed to take into consideration any matters personal only to the ap-

pellant. If he knew of the nature of respondent's ailment when he agreed to make her his wife, notwithstanding the same, he ought not to escape responsibility by reason of any inconvenience affecting only himself. But the interests of community and state step in, and, with the dictates of humanity, demand that no human compact shall be upheld that has for one of its principal objects the bringing into the world of helpless, hopeless, plague-cursed, innocent babes. We can sanction the breaking of a promise and relieve from the terms of a deliberate agreement only when the alternative involves results more deplorable. Had these parties married it is inconceivable that any of the important ends of marriage could have been attained. It is morally certain that sickness, grief and sorrow must have been the sequence of such a union. These considerations, with the possibility and probability of issue, afflicted with this terrible malady, constrain us to hold that the marriage agreement was not binding—that it was the privilege of either party to withdraw therefrom."

#### INJURIES RECEIVED BY PERSONS ON PUBLIC SCHOOL PREMISES

A general discussion as to who is liable in the case of injuries received upon public school property, is suggested by the case of *Alfred Wahrman v. The Board of Education of the City of New York*, recently decided by the Court of Appeals. The Statutes of New York authorizing the control of the Department of Public Instruction have been frequently brought before the courts for interpretation in cases involving the liability of various officers for injuries received by persons attending the schools. Many such actions have been brought against the city corporation, in which cases it has been held that the rule of *respondent superior* does not apply to make the city liable for the negligent acts of the agents and servants of the department as for example that of Public Charities and Corrections, *Maxmilian v. The Mayor*, 62 N. Y. 160; and the Board of Education, *Terry v. The Mayor*, 8 Bosw. 504. Chap. 386 Laws of 1851, 301 Laws of 1853, 101 Laws of 1854, 574 Laws of 1871, 112 Laws of 1873 have been construed as vesting in the "Board of Education" the general control and care of school buildings and property "for the purposes of public education," while the especial care and safe keeping of such buildings in the respective wards is committed to the "ward trustees," who are also authorized to make repairs. *Donovan v. Board of Education*, 85 N. Y. 117, points out that, for the negligent acts of the ward trustees or their agents, the Board of Education is not liable as their functions are distinct. *Donovan v. McAlpin*, 85 N. Y. 185, lays down a rule exempting the "ward trustee" from liability for the injuries caused by the negligence of a janitor or workman employed by him on a school building. The principle of this exemption seems to have been the general rule that public officers are not liable personally for the malfeasance or misfeasance of their employees or agents. *Story, Agency*, 321. And the only remedy the injured person has,

where the public officer is without compensation and derives no benefit from the acts of the negligent agent, is against the immediate wrong-doer. *Jones v. Bird*, 5 B. and Ald. 837. Of course the public or administrative character of a person or body affords no immunity against the consequences of its own negligence. *Story, Agency*, §320. And it was with this doctrine in mind that the Court of Appeals decided the present case holding the Board of Education liable. The plaintiff, a pupil in the public schools, had been injured by the falling of the ceiling in the school-room while he was occupying the seat assigned him. The holding points out that it was the duty of the "trustees" or other officers to repair this ceiling and that "the board" is in no way chargeable for the negligence of the "trustees" but that it is liable for its own negligence in this case for failing to close the room until the repairs should have been made.

#### TRADE NAMES.

The doctrine of unfair trade, which has of late years been so greatly developed, and its application or lack of application to a copyright, were lately discussed in the case of *Ogilvie v. G. & C. Merriam Co.*, 148 Fed. Rep. 858. There it was decided that the G. & C. Merriam Co. at the expiration of their copyright did not have a right to the exclusive use of the name "Webster" in the title of dictionaries of the English language and that the printing of the publisher's name (George W. Ogilvie) on the back or cover and title page was enough to distinguish the dictionaries published by him from those of the original publishers (G. & C. Merriam Co.) who had been owners of the copyright during its life.

The contention was that, in as much as the G. & C. Merriam Co. had had a copyright, and, that during the running of that copyright, had established a reputation for "Webster's" dictionaries, which were published only by said company, they should be protected in the reputation thus acquired by having the sole right to the use of the word "Webster" in that connection, even after the expiration of the copyright. This claim Colt, Circuit Judge, disposed of by saying that to give the public "the right to publish the book, and not the incidental right to use the name by which it is known, is in effect to destroy the public right, and to perpetuate the monopoly." This is but in accord with the opinion of Mr. Justice Miller in *Merriam v. Holmway Pub. Co.*, 43 Fed. Rep. 450, when he says, in effect, that a man has no right to continue his monopoly under the pretence that it is protected by a trade-mark, trade-name, or anything of that sort.

Indeed, the present case cannot be differentiated from the patent cases, such as the *Singer Manufacturing Co. v. June Manufacturing Co.*, 163 U. S. 169, and *Fairbanks v. Jacobus*, 14 Blatchford 337. The doctrine laid down, in such cases, is, that, on the expiration of a patent the right to make the patented article and to use the generic name passed to the public with the dedication resulting from the expiration of the patent.

In *Linoleum Mfg. Co. v. Maine*, 7 Ch. Div. 834, the same doctrine was applied but Fry, J., said (p. 837):

"If I found they were attempting to use that name (Linoleum) in connection with other parts of the trade-mark, so as to make it appear that the oxidized oil made by the defendants was made by the plaintiffs, of course the case would be entirely different."

As early as 1783, there are dicta regarding the doctrine of unfair trade, though that term was then unknown. In the case of *Singleton v. Bolton*, 3 Douglas 293, decided in that year, it was said that if a defendant sold an article of his own under the plaintiff's name and mark, that would be fraud for which an action would lie. And, later in 1824, this principle was restated with the qualification that the goods so marked must be sold as those manufactured by the plaintiff, to give him a right of action. *Sykes v. Sykes*, 5 D. & R. 292.

From that time to the present day the doctrine of unfair competition, though in various disguises, has been the object of ever increasing application until, at this time, it occupies a prominent place in the law. Stated in brief, and in its most comprehensive form, it is that no man has a right to pass off his goods upon the public as and for the goods of another, and thereby work a fraud upon both the public and his rival in trade. This principle is broader than the rules applicable to strict, technical trade-marks, but it is not something separate and apart from trade-mark law. Rather it may be said, it lies at the very foundation of trade-mark law, and covers besides a large field to which some of the technical trade-mark rules do not extend.

Independently of the existence of any technical trade-marks, no manufacturer or vendor will be permitted to so dress up his goods, by the use of names, marks, letters, labels or wrappers, or by the adoption of any style, form or color of packages, or by the combination of any or all of these indicia, as to cause purchasers to be deceived into buying his goods as and for the goods of another. *McLean v. Fleming*, 96 U. S. 245; *Lawrence Manufacturing Co. v. Tennessee Manufacturing Co.*, 138 U. S. 537.

So in the case of *Genesee Salt Co v. Burnap*, 20 C. C. A. 27, it was held that a manufacturer of salt in the Genesee valley will not be enjoined from using the word Genesee in connection therewith, but he will be restrained from using it in any color, style or form of letters, or in combination with other words, so as to imitate a combination previously used by another maker of salt in the same locality.

So Mr. Justice Brown in *Coats v. Merrick Thread Co.* 149 U. S. 562, says that irrespective of any question of trade-marks, "rival manufacturers have no right, by imitative devices, to beguile the public into buying their wares under the impression that they are buying those of their rivals."

In the case in question the above principles were fully recognized and the court held that Ogilvie had done all that the law required to distinguish his dictionaries from those of the Merriams.



Naturally, it is a question of fact in each particular case, whether or not one manufacturer has or has not distinguished his goods from those of a rival manufacturer, where the same name is used describing both. The great trend of recent decisions is emphatically to broaden the doctrine of unfair competition and protect those injured. But, where the goods are distinguished, in one way or another, in such manner as the court thinks proper and fair, it will not interfere though the complainant is somewhat injured.

## RECENT CASES

**ADVERSE POSSESSION—EVIDENCE—COLOR OF TITLE.**—*LITTLE v. CRAWFORD, ET AL.*, 88 PAC. 974 (IDAHO).—*Held*, where C. was in possession of real estate and conveyed same by quit claim deed to L., and L. took possession thereof under claim and color of title, and held open, notorious, and adverse possession under such claim of title and made valuable improvements thereon, and paid all taxes assessed against said property for a period of more than five years, he secured title thereto by adverse title or prescription.

Color of title, in order to sustain a claim of adverse possession, may be shown by any paper which appears to have conveyed the land, and it is immaterial whether this paper actually conveys a good or bad title so long as the person claiming under it does so in good faith. *Unto v. Carpenter*, 21 Cal. 445. Where one is said to have color of title it is supposed that some act has been done which gives him title, good or bad. *St. Louis v. Gorman*, 29 Mo. 593. And where the title is colorable, and is held *bona fide* for a statutory period, it is sufficient to give the holder thereof the real title. *Abercrombie v. Baldwin*, 15 Ala. 363. Another case in the same state is directly in point and holds that color of title was sufficient to give the possessor the real title provided he received the land in good faith not knowing the title to be bad and that he resided thereon for the statutory period. *Goodson v. Brothers*, 111 Ala. 589.

**ATTORNEY AND CLIENT—COMPROMISE BY ATTORNEY.**—*SERREE v. SERREE, ET AL.*, 99 S. W. (KY.) 282.—*Held*, an attorney has no power to compromise his client's case without her consent. An attorney cannot compromise an action on payment of his costs, without the knowledge and consent of his client, unless specially authorized so to do. *Mandeville v. Reynolds*, 5 Hun. 338. An attorney cannot negotiate away a judgment by way of compromise, without the consent of his client. *Boyle v. Beattie*, 2 Cin. R. 490. An attorney, without express authority from his client, has no power to bind the latter, by a compromise judgment in a litigated suit for less than the amount demanded. *Senn. v. Joseph*, 106 Ala. 454. An attorney at law, conducting an action of ejectment cannot, without his client's consent, fix upon a boundary by way of compromise. *Mackey v. Adain*, 99 Pa. St. 143.

**BOUNDARIES—FENCES.—ACQUIESCENCE**, 109 N. E. 287 (IOWA).—*Held*, that where adjoining land owners treat a division fence as a boundary between their respective farms for a period of twenty years, the fence will ordinarily be regarded as marking the true boundary line between them. Tiffany in his work on real property lays down the proposition that when a fence is recognized as a partition fence the continued existence of such a fence will be regarded as an acquiescence that the fence in question forms the boundary. *Tiffany on Real Property*, Vol. I, 584. This proposition has been supported by the cases of *Darst v. Eulow*, 116 Ill. 475; *Jones v. Smith*, 64 N. Y. 180. A Vermont case has gone farther than this in holding that the mere acquiescence in a line as a dividing line for fifteen years, although but one

of the proprietors and perhaps neither is in actual possession, is sufficient to establish that line as a true division line if known and claimed by both proprietors. *Brown v. Edson*, 23 Vt. 435. *Hubbard v. Stearns*, 86 Ill. 35, held that where two proprietors of adjoining lots acquiesced for twenty years in a certain fence as a boundary which was supposed by them to be the true boundary it was immaterial whether it was the true boundary or not, as by the limitation law it would be a conclusive presumption that it was the true line. To support this doctrine is a statement by Greenleaf: "So possession of land for the length of time mentioned in the statutes of limitation under a claim of absolute title, and ownership, constitutes against all persons but the sovereign, a conclusive presumption of a legal grant." *Greenleaf on Evidence*, Vol. I, Chapter IV, Section 16.

**BROKERS—COMMISSIONS—SALE EFFECTED WITHOUT THEIR AID.**—*ETTINGHOFF ET AL. V. HOROWITZ*, 100 N. Y. SUPP. 1002.—*Held*, that brokers were not entitled to a commission for procuring a customer for their principal's real estate, where he sold the premises to another before they produced their customer. Hooker, J., *dissenting*.

The above holding has followed the principle laid down in *McClure v. Paine*, 49 N. Y. 563. But in *Gaty v. Sack*, 19 Mo. 471, it was held that notice of the rescission of the broker's contract by the employer must be given before the broker performs; and where the principal made improvements on property apparently inconsistent with the continuance of the agency to sell, such acts did not constitute revocation, *Lloyd v. Mathews*, 51 N. Y. 124; also where plaintiff, a broker, sold stock for a savings bank, as directed by its president, and the president, during the agency, sold the stock, the bank was held liable, *Listare v. Best*, 11 Hun. 611. However, the greater weight of authority seems to be that a broker's agency is revocable without notice unless coupled with an interest in the subject-matter of the sale or entered into by reason of a valuable consideration. *Brown v. Pfarr*, 38 Colo. 550.

**CONTRACTS—CONSTRUCTION.**—*GROTHE V. LANE*, 110 N. W. 305 (NEB.).—*Held*, that a contract should be construed to give effect to the intention of the contracting parties, keeping in mind the situation of the parties, the property which is the subject-matter of the contract, and the use to which it is being applied.

Contracts should be so construed as to give effect to the intention of the parties, and where the intention is sufficiently apparent, effect should be given to it, even if it is not in harmony with the words used; for greater regard is to be had for a clear intent, than the words used to express the intent. *Walker v. Douglas*, 70 Ill. 445. In construing a contract, the surrounding circumstances must be taken into consideration. *Mobile, Montgomery Ry. Co. v. Jurey*, 111 U. S. 584; *Roberts v. Bonaparte*, 73 Md. 191. In the construction of a contract, the intention of the parties must govern, and to ascertain that intention regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the object they had in view. *Strong v. Gregory*, 19 Ala. 146; *Montgomery v. Fireman's Ins. Co.*, 55 Ky. 427. But where the words are capable of one meaning the contracts are to be administered according to the terms set forth therein. *Mudgett v. U. S.* 9 Ct. Cl. 467.

**CRIMINAL LAW—REASONABLE DOUBT.**—*STATE V. UZZO*, 65 ATL. (DEL.) 775.—*Held*, that in a criminal prosecution, defendant is presumed to be

innocent until his guilt is proved to the satisfaction of the jury beyond a reasonable doubt; but such doubt must not be a mere fanciful, vague, speculative, or possible doubt, but a reasonable, substantial doubt, remaining after a careful consideration of all the evidence.

Proof of defendant's guilt must be made so as to exclude all reasonable doubt. *U. S. v. Jackson*, 29 Fed. Rep. 503; *Warlatt v. People*, 104 Ill. 364. It is impossible to define precisely what a reasonable doubt is, and the expression is so simple that it is best used alone, *State v. Reed*, 62 Me. 129; *Mickey v. Commonwealth*, 72 Ky. 593. It must however be founded on a consideration of all the circumstances and evidence and not on mere conjecture or speculation, *Kennedy v. State*, 107 Ind. 144; and must not be a mere misgiving of the imagination or misplaced sympathy, *State v. Murphy*, 6 Ala. 845; but natural and substantial, not forced or fanciful, *State v. Bodekee*, 34 Iowa 520, but such an honest uncertainty existing in the minds of a candid, impartial and diligent jury as fairly strikes the conscientious mind and clouds the judgment. *Commonwealth v. Drum*, 58 Pa. St. 9; *Polin v. State*, 16 N. W. (Neb.) 898.

**DAMAGES—INADEQUACY—PERSONAL INJURIES.**—*RICHARDSON v. MISSOURI FIRE BRICK Co.*, 99 S. W. 778 (Mo.).—Where, through defendant's negligence, an eleven-year-old boy's right elbow joint was permanently injured, so that he never would be able to extend the arm to the full length nor obtain its full use, and the injury caused him pain whenever he used it in a manner requiring strength in the elbow, *held*, that the trial court did not abuse its discretion in setting aside a verdict in his favor for \$500 as being grossly inadequate.

Where damages are found inadequate the verdict will be set aside, on the same principles that apply when the damages are excessive. *Hale on Damages*, 233. It has been held that in actions of tort, as a general rule, the verdict will not be set aside because the damages were too small. The court refused, in an action for the negligent construction of a building, whereby it fell and injured the plaintiff, to grant a new trial, on the ground that the jury had given merely nominal damages,—there being no reason for supposing them to have been actuated by improper motives. *Howard v. Barnard*, 11 C. B. 652. A new trial will not be granted in personal actions, founded upon tort and sounding merely in damages, on the sole ground of the smallness of the amount of the damages recovered. *Pritchard v. Hewitt*, 91 Mo. 547. But the rule is now established otherwise. Where the damages found by the jury were so small as to show that they must have omitted to take into consideration some of the elements of damage, a new trial was granted. *Phillips v. Railway Co.*, 5 Q. B. D. 78. The power of the court to award a new trial when dissatisfied with the verdict, is not open to question and whether because the verdict is too large or too small, the principle is precisely the same. *McDonald v. Walter*, 40 N. Y. 551.

**EVIDENCE—PAROL EVIDENCE TO VARY WRITING—ILLEGALITY OF CONTRACT.**—*TWENTIETH CENTURY Co. v. QUILLING*, 110 N. W. 174 (Wis.).—*Held*, that where a contract is against public policy, the parties cannot, by reducing an unobjectionable part of it to writing, prevent the reception of parol evidence to show the entire agreement, although the entire contract be inconsistent with the written paper.

It has long been established that the rule that parol evidence is inadmissible to contradict or vary the terms of a written contract, does not apply to contracts forbidden by the statute, by common law or by the general policy of the law. 1 *Greenleaf, Ev.*, 284; *Friend v. Miller*, 52 Kans. 139. The court will look through all disguises in order to detect fraud or illegality. *Martin v. Clarke*, 8 R. I. 389. But parol evidence will be admissible to impeach only an executory contract. "*In pari delicto potior est conditio defendentis, et possidentis.*" *Gisaf v. Neval*, 81 Pa. 354; *Marksbury v. Taylor*, 10 Bush. 519. For while the law refuses to enforce, it equally refuses to relieve a party who has suffered by the enforcement. *Collins v. Blantern*, 2 Wils. 341. Conversely, parol evidence is admissible to show that a contract apparently invalid is really valid. *Wesetrn Tr. & Coal Co. of Michigan v. Kilderhouse*, 87 N. Y. 430; *Griffin v. New Jersey Oil Co.*, 11 N. J. Eq. (3 Stockt.) 49.

EVIDENCE—RES GESTÆ—STATEMENTS ACCOMPANYING TRANSACTION.—*CHILCOTT ET AL. V. WASHINGTON STATE COLONIZATION CO., INC.*, 88 PAC. 113 (WASH.).—*Held*, where a corporation adopts and receives the benefits arising from contracts of its promoter, it is liable thereon.

Where a person renders professional services in preparing articles of incorporation under a contract in good faith with the promoters of the association, and the association avails itself of the benefits of such services the association is liable for the compensation. *City Bldg. Association*, 6 Ohio Dec. 1068. A corporation is liable for services rendered at the request of its incorporators soon after the granting of the charter, whether its officers have been elected or not. *Harrison v. Vermont Manganese Co.*, 20 N. Y. Supp. 194. A corporation in contemplation of formation at the time work was ordered by one of its incorporators, and which went to its benefit, is liable therefor. *Grier v. Hazard, Hazard & Co.*, 13 N. Y. Supp. 851. A corporation having carried on business, and held itself out to the world as such before it was organized according to law, the assets thereof should be made liable for its debts, though created previously to the completion of such organization.

EXECUTORS AND ADMINISTRATORS—LIABILITY FOR EXPENSES OF WAKE.—*MCCOLLOUGH V. MCCREADY, ET AL.*, 102 N. Y. SUPP. 633.—Where expenditures for a wake were exclusively for refreshments, including provisions, liquors, wines, and cigars, *held*, expenditures for a wake, made at the request of the widow of decedent who left no children, being reasonable, are recoverable of the executors as expenses of the funeral. *Gildersleeve, J., dissenting.*

It is the duty of the executor or administrator to bury the deceased, and from this duty springs a legal obligation, and from the obligation the law implies a promise to him who in the necessity of the case, directs a burial and pays such expenses thereof as are reasonable. *Patterson v. Patterson*, 59 N. Y. 574. Funeral expenses comprehend more than the shroud, the coffin, and the grave. Such expenses include carriage hire, vaults, and tombstones. *Donald v. McWhorter*, 44 Miss. 124. But the expenses incurred must be reasonable. *Fogg v. Holbrook*, 88 Me. 169, and to determine this the amount of the decedent's estate is to be considered. *In re Hasson's Estate*, 5 Pa. Co. Ct. R. 19. Mourning attire for widow has been allowed. *In re Wachter's Estate (Swr.)*, 38 N. Y. Supp. 941; *contra, Jenks v. Mathews*, 31

Me. 318. Removal of body to another state and traveling expenses of wife and near relatives allowed. *In re Carpenter's Estate*, 16 Phila. 290. So, too, have music and flowers. *In re Ogden's Estate*, 83 N. Y. Supp. 977. But in *In re Johnson's Estate*, 8 Pa. Co. Ct. R. 1, it was declared that the expenses of a wake, if not unreasonable, constitute a proper item of funeral charges, as for example, where the refreshments provided consisted only of cheese, crackers, and tobacco.

**EXPERT TESTIMONY—HYPOTHETICAL QUESTION.**—*KELLY v. KELLY*, 63 ATL. 1082 (MD.).—*Held*, that on an issue as to the capacity of a testator, a hypothetical question to a medical expert based on an assumption of fact shown only by hearsay testimony was not admissible.

Expert opinion evidence is admissible by reasons of necessity because such evidence lies not in the realm of the knowledge of the ordinary man and the expert's qualification rests on previous habit, study and professional experience. *Taylor v. Monroe*, 43 Conn. 33; and that opinion is admitted as facts when deduced from his investigation or on much of the evidence given in a trial at which he has been generally present or the counsel sums up all the evidence in the form of a hypothetical question. *People v. Muller*, 96 N. Y. 408; but the hypothetical question must be based upon the hypothesis of the truth of all the evidence or on a hypothesis framed of certain facts assumed to be proved for the purpose of inquiry, *Jackson v. N. Y. Central Ry. Co.*, 58 N. Y. 623; *Spear v. Richardson*, 37 N. H. 23. The assumption must be reasonably and fairly supported by the evidence shown, *In re Barber's Estate*, 63 Conn. 393, or reflect facts either admitted or proved by other witnesses, *Merrill v. Tegarden*, 19 Neb. 534; and, while an expert may give his opinion upon facts assumed to have been given and established, it would be against every rule and principle of evidence to allow him to state his opinion upon the conclusions and inferences of other witnesses, *Williams v. State*, 1 Atl. 887; and it should be based only on facts which have gone to the jury or which can go to the jury by the ordinary rules of evidence, in absence of statute, *People v. Augsburg*, 97 N. Y. 501.

**FRAUD—INTENT.**—*CERNY ET AL. v. PAXTON AND GALLAGHER CO.*, 110 N. W. 882 (NEB.).—*Held*, that ordinarily the deceit to ground a recovery must relate to existing facts, but if one person by means of a promise which he makes with the secret intention of not performing it, induces another to part with his money or property, he is guilty of actionable fraud. A representation upon which fraud can be predicated must be of an existing fact or a fact alleged to exist, and cannot consist of a mere promise. *Fouty v. Fouty*, 34 Ind. 433; *Murray v. Smith & Sons*, 42 Ill. 548. But where there is a purchase of goods on credit, there is an implied representation to pay for them; and an action for deceit will lie against the one who obtains goods on credit, with no intention of paying for the same. *Swift v. Rounds*, 19 R. I. 527. A contrary view in the majority of the decisions seems to prevail to the case just cited. *People v. Healy*, 128 Ill. 9; *Welshbillig v. Dienhart*, 65 Ind. 94; *Gallagher and Mason v. Brunel*, 6 Cow. 346 (N. Y.). An action for deceit will not lie for inducing the plaintiff to convey to the defendant certain real estate in consideration of a loan of a certain sum of money, and a promise on the part of the defendant, to execute to the plaintiff, a bond for reconveyance on payment of the loan, and a refusal to execute bond after conveyance. *Long v. Woodman*, 58 Me. 49. But a fraudulent promise made

by the maker of a promissory note to the payee, by which the maker got possession of the note and held it until the Statute of Limitations had run, is actionable. *Cockrill v. Hall*, 65 Cal. 326.

FRAUDS, STATUTE OF—DEBT OF ANOTHER—ORIGINAL OR COLLATERAL PROMISE.—MECHANICS' AND TRADERS' BANK V. STETHEIMER, 101 N. Y. SUPP. 513.—*Held*, that where a bank refused to loan money to a corporation, whereupon the directors orally agreed with the bank that each one would guarantee their proportionate share of the amount of the loan, and the loan was then made, the promise of the directors was within the statute of frauds (Laws 1897, p. 510, c. 417, Section 21), as a promise to answer for the debt of another. McLaughlin, J., *dissenting*.

Whether the promise is within the statute depends on how the credit was given. *Clark on Contracts*, p. 68. If the credit was given exclusively to the promisor his undertaking was original. *Chase v. Day*, 17 John. 114; *Hartley v. Varner*, 88 Ill. 561. And likewise when, although the effect of the promise was to pay the debt of another, the leading object was not to become guarantor or surety but to subserve some purpose of his own, *Davis v. Patrick*, 141 U. S. 479, or where the promise is to indemnify the promisee against any liability which he may incur. *Jones v. Bacon*, 145 N. Y. 446; *Aldrich v. Ames*, 9 Gray 76. But where the promise is to indemnify the promisee against any loss he may sustain by reason of the default or miscarriage of a person under liability to him the promise is within the statute. *Nugent v. Wolf*, 11 Penn. 471; *Mallory v. Gillett*, 21 N. Y. 412. And in all cases the inquiry is whether such promise is independent of the original debt or contingent upon it. *Brown v. Waber*, 38 N. Y. 187.

HOMICIDE—TRIAL—INSTRUCTIONS—INVADING PROVINCE OF JURY.—LOGAN V. STATE, 43 SO. REP. 10 (ALA.).—*Held*, that court is not invading the province of jury when he charges them that if they believe the defendant cursed deceased, and told him he was going to kill him and said this as soon as he saw deceased, and further, that defendant immediately after using such language, shot deceased, then defendant could not be acquitted on the plea of self-defense. Dowdell, Anderson and Denson, JJ., *dissenting*.

The jury are the sole determiners of controverted questions of facts, and instructions that the defendant was the aggressor is ground for reversible error as it invades province of the jury. *Watson v. State*, 82 Ala. 10. Charges which are abstract or invade the province of the jury, are improper. *Springfield v. State*, 96 Ala. 81. An instruction that, "if you believe from the evidence that the defendant brought on the difficulty for the purpose of stabbing deceased then there is no ground for self-defense and you cannot acquit him on that ground," is erroneous, in absence of any evidence to that effect. *State v. Smith*, 125 Mo. 2. But, although judges are not allowed to charge juries with respect to matters of fact, it does not prohibit them from determining and charging the jury as to whether there is any evidence in regard to the issue or tending to sustain a fact on which a conviction or judgment may depend. *People v. Welch*, 49 Cal. 174.

INSURANCE—PROOF OF LOSS—WAIVER DENIAL OF LIABILITY.—THOMPSON V. GERMANIA FIRE INS. CO., 88 PAC. REP. (WASH.) 941.—*Held*, that where there is an oral insurance contract, and the company, within the time written contracts provide for proving loss, denies liability on the ground that there is no contract, it waives proof of loss.

Waiver of proof of loss may be either, express, *Edgerley v. Farmers' Ins. Co.*, 48 Iowa 644, or inferred from any act of the insurer evincing a recognition of liability or a denial of obligation, exclusively for other reasons, *Lebanon Mut. Fire Ins. Co. v. Erb*, 112 Pa. 149; *Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571. Want of proof of loss, *Graves v. Wash. Marine Ins. Co.*, 94 Mass. 391; *Caledonian Ins. Co. of Scotland v. Traub*, 80 Md. 214; or a defect in same, *State Ins. Co. v. Waackens*, 38 N. J. Law 564; *Metropolitan Acc. Assn. v. Froiland*, 161 Ill. 30, is waived by denial of liability on the grounds that there is no contract at all, *Rathbone v. City Fire Ins. Co.*, 31 Conn. 193. Such denial, however, must be made by an agent capable of waiving such proof, *Aetna Ins. Co. v. Shryer*, 85 Md. 362; *East Texas Fire Ins. Co. v. Coffee*, 61 Tex. 287; and be made to beneficiary and not to a third person, *Employers' Liability Assn. Corp. v. Rochelle*, 35 S. W. 869. This rule is in harmony with the elementary principle that a party who places his refusal upon one ground, cannot after action brought, charge to another and different one, *Aetna Ins. Co. v. Shryer*, *supra*.

JUDGMENT—PERSONS CONCLUDED—RUMFORD CHEMICAL WORKS V. HYGIENIC CHEMICAL CO., 148 FED. REP. 862.—*Held*: That one is not bound as a privy merely because he contributes to the defence, without having the right to control the proceedings or to appeal from the judgment or decree.

Parties to be bound by a judgment are all persons having a right to control the proceeding, to make a defence, to adduce and cross-examine witnesses and to appeal from the decision of an appeal lies, 1 *Greenleaf Ev.*, Section 535; *Peterson v. Lothrop*, 34 Pa. 223; all these privileges are essential and only those who had enjoyed them collectively are concluded by a judgment, *Cecil v. Cecil*, 19 Md. 72. General rule is that mere contribution to the defence will not make a judgment binding on a party outside of record. *Goodnow v. Stryker*, 62 Iowa, 221; *Lebanon v. Mead*, 64 N. H. 8; *Gaytes v. Franklin Nat. Bank*, 85 Ill. 256; not even if one contributes to the employment of counsel for parties to the suit, *Lowndale v. City of Portland*, Fed. Cases, No. 8578, (1 Or. 381). The exceptions are well defined and supported by numerous cases. Whenever a tenant, agent or servant, or other party to a relation, contractual or representative, is defended by his landlord, principal or master, respectively, the judgment is binding on the latter. *Castle v. Noyes*, 14 N. Y. 329; *Thomsen v. McCormick*, 136 Ill. 135.

LANDLORD AND TENANT—LEASE—CROPS—LIEN.—THOSTESSEN V. DOXSEE ET AL., 110 N. W. 567 (NEB.).—*Held*, that a clause in a lease attempting to create a lien on the crops to be raised on the leased premises for the payment of rent reserved is ineffectual to create either a legal or equitable lien on the crops grown thereafter on the leased premises.

It has been held that a stipulation that future acquired property shall be held for security for some present engagement is an executory agreement of such a character that a creditor may under it take the property into his possession when it comes into existence and the lien will be good. *Butt v. Ellett*, 19 Wall. 544. But in most jurisdictions the agreement itself, although it may be a license to take possession subsequently, *Holoyd v. Marshall*, 10 H. L. Cas. 215, being an attempt to contract for something not having even a potential existence, *Moody v. Wright*, 13 Met. 17; *Williman v. Neher*, 20 Barb. S. C. 37, creates neither a lien nor a right of property, *Long v. Hines*, Ho. Kan. 220; *Williams v. Briggs*, 11 R. I. 476, until by "a new intervening



act," after the property is acquired, the possession is given to the creditor. *Newton v. Withey*, 5 Vt. 97; *Brown v. Neilson*, 61 Neb. 765.

MASTER AND SERVANT—INJURIES TO SERVANT—WARNING—DELEGATION OF DUTY.—*HENDRICKSON v. UNITED STATES GYPSUM CO.*, 110 N. W. 322 (IA.).—*Held*, that the duty of a master operating a mine to warn employees of an expected explosion in blasting was one which could not be delegated to a fellow servant of the person injured. Bishop, J., *dissenting*.

A master in delegating one servant to warn a fellow-servant of a special danger, does so at his peril, *Wheeler v. Wason M'Pg Co.*, 135 Mass. 294; and so where the employer places his employees where there is unusual danger, even though a foreman directs the work, *Thompson v. Chicago M. & St. P. Ry. Co.*, (C. C.), 14 Fed. 564; also where an apprentice was killed while working under the direction of his tradesman, *Missouri Pac. Ry. Co. v. Pergeoy*, 36 Kan. 424. But where a servant was injured through negligence of one whose duty it was to give signal when a bale was about to be lowered into a ship, it was held that the master was not liable, *Cheaney v. Ocean S. S. Co.*, 86 Ga. 278; and where a section hand was killed while working on the railroad under the direction of a foreman, no money could be had against the railroad company, *Shea v. Pa. R. Co.*, 13 Atl. 193. However, the tendency of the courts is to lay down the rule that a master cannot by delegating his authority to another, avoid liability and the presumption as to the point in question is in favor of the plaintiff. *F. T. Smith Oil Co. v. Slover*, 58 Ark. 168; *Carlson v. Northwestern Tel. Exch. Co.*, 63 Minn. 428.

MASTER AND SERVANT—INJURIES TO THIRD PERSONS—SCOPE OF EMPLOYMENT.—*ST. LOUIS SOUTHWESTERN RY. CO. v. BRYANT*, 99 S. W. 693 (ARK.).—*Held*, that where the foreman of a bridge gang employed by a railroad threw from a moving train a water cooler belonging to him, whereby plaintiff was injured, and there was no evidence tending to show that it was in the line of his duty to provide appointments for the cars, his act was not one for which the railroad company could be held liable as within the scope of his employment.

In determining the question of authority the object, purpose, and end of the employment are to be regarded; and in every instance it becomes a mixed question of law and fact, to be settled by the peculiar facts and circumstances, *Cooley on Torts*, (3d Ed.) 1035, which have not always been consistently interpreted. Thus where a section foreman used a hand car in his own business and negligently injured one at a crossing, the company was held not liable. *Branch v. International, etc., Ry. Co.*, 92 Tex. 288; *contra*, *Salisbury v. Erie R. R. Co.*, 66 N. J. L. 233. And compare *Ritchie v. Waller*, 63 Conn. 155 with *McCarthy v. Timins*, 178 Mass. 378. But where a brakeman threw a stone at a boy who had been trespassing, and the stone struck another person, the act was declared not done in behalf of the railroad company which was accordingly not liable. *Georgia R. and Banking Co. v. Wood*, 94 Ga. 124. And where the defendant's driver injured a boy, the defendant's liability was said to be contingent upon whether the act was to gratify personal malice or to remove the boy from the wagon. *Brennan v. Merchant*, 205 Pa. 258. In harmony with the present case is *Walton v. New York Cent. Sleeping Car Co.*, 139 Mass. 556, where a sleeping car porter threw from the car a package to his washerwoman, thus injuring the plaintiff. The act was declared outside of the scope of his employment.

## REVIEWS

*Die Kodifikation des Automobilrechts.* Dr. Fr. Meili. Vienna, 1907. Manzschke k. u. k. Hof-Verlags- und Universitäts-Buchhandlung. (Rights of translation reserved.) pp. 188.

Professor Meili in this work hails the automobile as the worthy comrade of railroad, telegraph, and telephone in the new era of free and quick international communication. In giving its early history, he refers (p. 2) to one which France exhibited at the St. Louis Exposition, built in 1769, and quotes from the work published last year by Xenophon Huddy (Y. L. S. 1901) on the Law of Automobiles, to show that the first beginnings of the invention were in the seventeenth century. He predicts its increasing use in war, for purposes of which it was first seriously utilized by Austria (pp. 4, 128).

In Europe the regulation of automobiling is commonly left to orders of the police and administrative authorities, but three of the powers, England, Denmark and the Netherlands, have made it the subject of formal statutes (pp. 6, 9). The automobilist on the continent is continually running from the sphere of one set of rules into that of another, and what these rules may be it is not always easy for the traveller to ascertain (p. 17, note), nor even the local name for the vehicle which carries him (p. 20).

The right to drive an automobile is denied in parts of Europe to those under seventeen or eighteen years of age, and in other parts to those under twenty-one (p. 39). In several countries, personal examinations are made into the qualifications of motorists. France extends hers to their prudence, coolness, quickness, rapidity of glance, and appreciation of the necessity of using highways for general public travel (p. 40). Provision is made in most countries for excluding those from serving as chauffeurs who have proved themselves unfit, and in some for their sentence to imprisonment in case of serious damage done to others (p. 150) or of an attempt to speed away after accident and escape detection (p. 157).

Germany has been behind France in providing compensation for those injured by automobiles, because of the general provision in the *Code Napoleon* (Art. 1322) that every act whatever of one man to the damage of another obliges him by whose fault it occurred to make due reparation (p. 73). European automobilists can now insure themselves at quite moderate rates against damage from accidents; the premiums varying with the rate of horse power of the machine and the amount insured (p. 89). Belgium has recently undertaken to indemnify those injured by an automobile, when the driver escapes detection and arrest. The amount of the indemnity may be made

the subject of an agreement or of a law-suit, and it is paid from a fund created by an impost of five per cent on the taxes paid upon each automobile (p. 92) and by making the automobilist, chargeable with an accident, who is found, pay double damages, half to go to the State (p. 122) for this purpose.

Professor Meili refers to the wish, expressed in Mr. Huddy's treatise, that there were one law for automobiling throughout the United States, as an aspiration that might well be universal in Europe (p. 184).

This work has the advantage of being by no means the first in the field. The author is therefore able to refer freely to his predecessors, and use their positions as stepping-stones for further advances. The reader of his book would not be able to travel in a motor car over Europe, secure of knowing every rule that he might transgress, but he would be put on the track of many of them and would at least feel that, if he failed to use due care, he would get prompt, if not full justice. S. E. B.

*The Principles of German Civil Law*, by Ernest J. Schuster; pages xlv, 684, Clarendon Press, 1907.

The rapidly increasing desire for a closer view and wider knowledge of German institutions renders such a book as this specially welcome. Dr. Schuster has carried out his evident aims in a highly practical manner, the result being that for the first time in our own language and with a directness only rendered possible through recent imperial law reform, the outlines of German law are as accessible to us as are those of the common law itself. While, however, the codification which became finally effective in 1900, has done much for the simplification of German jurisprudence—uniformity being now established in many departments where previously there had reigned the infinitely varied differences bequeathed by mediæval confusion—nevertheless an immense field still lies open to purely state activity (*Landgesetz*). This most important fact is duly appreciated by our author (in his introduction), and he briefly summarizes certain general positions of the *Introducing Statute* (*Einführungsgesetz*), through which reservations are provided in favor of individual legislation by the States as against the Empire. Later on, too, and as subjects suggest a reference to the matter, many such reservations are noted in greater detail. We could wish, notwithstanding, that the distinctions thus arising had been more sharply emphasized. That there is need for this is seen in the striking recurrence (in sections 56—152 of the *Einführungsgesetz*) of the expression "*unberührt bleiben*" (there remain untouched); this appears not less than *ninety-two* times in these sections. Noteworthy among the subjects thus excepted from modification by the civil code, is that of the privilege still possessed by reigning families and descendants of houses mediatized after the fall of the old empire to legislate in matters touching their family property and affairs; the faculty

in question is known as *Autonomie*, and by its exercise hereditary property and effects (*Stammgüter*) are withdrawn from alienation and preserved within the mystic circle of those possessing *Ebenbürtigkeit* (equal birth rank). Through this endowment modern representatives of individuals once entitled to membership (*Mitgliedschaft*) in the Romano-Germanic Reichstag are, in the department of family law, upon a level with those actually occupying thrones; they are the "Reichsstandschaft—der hohe Adel." Their number, in all Germany, however, is very small. At Vienna, in 1815, some twenty-two of these "standesherrliche" families were recognized in Prussia, for example, as thus set apart from common men. Prominent names among them are those of Stollberg, Hohenlohe, Schönburg.

While Dr. Schuster briefly sketches, at the outset of his work, preliminary steps leading to the formation of the civil code (*Bürgerliches Gesetzbuch*), he fails to give us any glimpse either of the literature of the subject or of the men whose labors, long ago, laid a foundation for what has been accomplished to-day. Much would be gained by some allusion to the discussions between Thibaut and Savigny. To the impulse given by the former was due that outburst of polemic which signalized the year 1814 and the years following, and whose immediate result while, in a certain sense, negative, successfully brought into a clear light those principles which merely waited the coming of appropriate political conditions to realize the best hopes of their illustrious protagonist. In this connection, too, we miss a reference to the long and picturesque process known as the *Reception* of the Roman law, nor have we any indication of the profound influences which sprang from the teaching and writings of Hugo, Eichhorn, Wächter, and other heroes of modern legal progression. While the first code-committee (of 1874) brought forth what was considered a text-book of Roman law institutes rather than a statute for the guidance of practical men and thus incurred much reproach, it is, nevertheless, true (as remarked by Dr. Schuster) that the law of Rome forms the basis of the existing code. The student, therefore, requires some preparatory knowledge of the system hitherto obtaining in Germany—and of which no adequate account is to be found in our own language—before he can fitly approach the statements and analyses of present-day doctrine so carefully and exactly furnished in the book before us. Despite a lack of such aid in our author's pages, it is a pleasure to call attention to his happy employment of the *comparative* method. This feature of the book lends to it a distinct value. From both Roman and English sources are constantly drawn parallels and illustrative references lighting up many a chapter, and imparting great charm to the whole; instances of such treatment are to be found in chapter 4, on "circumstances affecting liability;" in chapter 5, on "discharge of obligations;" in chapter 7, on "transfer of rights and duties;" in the discussion touching "purchase and sale" at page 209; "bailment," at page 297; "the general treatment of torts,"

at page 334 seq.; "servitudes" (Dienstbarkeiten, Reallasten), at page 415 seq.; "marriage-law," at page 489, where we have an exceptionally valuable tabular comparison with English regulation; and the entire subject of "inheritance," which forms the closing portion of the work. Excellent, also, is the notice, page 291 seq., concerning "agreements between authors and publishers."

Prefixed to the introduction are tables showing titles and dates of the recent codes and statutes both German and English commented upon together with English cases cited in the text, and reference-lists of passages cited from the civil and commercial codes, the introducing statute, and the civil procedure act. In the matter of rendering into English the somewhat entangling expressions so characteristic of German legal terminology, our author is, in the main, very fortunate. We should, perhaps, choose *citizenship* as more closely expressing the conception denoted by *Staatsangehörigkeit* than *nationality* given as its equivalent by Dr. Schuster. The difficult term *Rechtsgeschäft* is translated "Act-in-the-law." This expression, naturalized in jurisprudence since the days of Hugo and around which there has arisen a vast literature, is intended to connote the idea of the personal element present in the generation of rights, and thus signifies a declaration of volition through which a right becomes founded, changed, or abolished. Dr. Schuster's characterization, in line with that of Windscheid, is "a manifestation of the human will intended to create an effect recognized by law." Of the many definitions to be found in modern treatises probably the clearest is given by Bekker who considers the term as expressing the conception of a juristic actuality whereof will-declaration forms an indispensable element. Dr. Schuster's view of the several departments into which the subject naturally falls—capacity, formation of agreements, interpretation, etc.—is close and sufficient.

In conclusion, we heartily congratulate the author of this valuable work. That it will open new aspects of useful knowledge to many seems well assured. Its appearance is a hopeful sign of the times.

G. E. S.

SCHOOL AND ALUMNI NOTES

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The annual Wayland prize debate, under the auspices of the Yale Kent club was held April 17th, in Hendrie Hall, and resulted as follows: First, George Price Whitman, '07, Atlanta, Ga.; second, Clifton Junius O'Hara, '08, Carthage, Ill.; third, Terence Byrne Cosgrove, P. G., Seneca, Ill.

Professor John Wurts, Lafayette S. Foster Professor of the English Common Law, delivered the quadrennial Foster Foundation Address, in Hendrie Hall, April 15th.

The competition for the Munson prize, under the auspices of the Yale Wayland club, was held in Hendrie Hall, April 19th. The contest resulted as follows: 1st, Harold Burton Jamison, '08, Gloversville, N. Y.; 2nd, Walter Preston Armstrong, '08, Coffeeville, Miss.; 3rd, Thomas Joseph Molloy, '08, Hartford, Conn.

Edward B. Morris, 97 S., who has under way a Yale Mortality Investigation, announces that the records of the early classes of the Yale Law School are incomplete. Graduates and others, who have in their possession records which would be useful to Mr. Morris, can be of particular assistance if they will send their information to him in care of the Travelers' Insurance Company of Hartford, Conn.

The Law School Society of Corbey Court and Phi Delta Phi announces the election of the following men: Harold Espe Drew, 1906, 1908 L., of Ansonia, Conn.; Samuel Henry Bowman, Jr., 1909 L., of Minneapolis, Minn.; Harry Anthony Campbell, 1909 L., of Kane, Pa.; Edward Colpitts Weyman, M.A., 1905, 1909 L., of Apohaqui, N. B.

The *Alumni Weekly* has the following sketch of Charles Cheney Hyde, who was appointed at the March meeting of the Corporation to give the courses in International Law next year. He will take Professor Woolsey's place, who will be absent on leave.

Mr. Hyde is the son of James Nevins Hyde, A.B. Yale '61, M.D., formerly passed Assistant Surgeon, U. S. N., now Professor of Dermatology, Rush Medical College, Chicago. He was born May 22, 1873, in Chicago; attended Harvard School, Chicago, from 1880 to 1890, and the year from 1890 to 1891 he spent in the study of English with a private tutor. He entered Yale College in September, 1891, was editor of *Yale Literary Magazine*, studied International Law in senior year under the late Hon. Edward J. Phelps, and received the degree of A.B. in 1895. He received the degree of

A.M. from Yale University in 1898 for the work done in American History and International Law while at Harvard Law School on thesis: "The Anglo American Treaties" (a portion of which was subsequently published in the *American Law Review*). He attended Harvard Law School from 1895 to 1898, where he studied International Law under Professor Beale. He received the degree of LL.B. in 1898. He was admitted to the Illinois bar in 1898 and entered the law offices of Holt, Wheeler & Sidley. He practiced law independently from 1901 to the present time. He was appointed Lecturer on American Diplomacy at Northwestern University in 1899, Instructor in Law in 1901, Assistant Professor of Law in 1902, and Associate Professor of Law in 1904, which latter position he now occupies. He has charge of Courses on International Law, Conflict of Laws, and American Diplomacy. Mr. Hyde is a contributor to the *American Law Review*, *YALE LAW JOURNAL*, *Harvard Law Review*, and *Green Bag*, on topics relating to International Law, and is the author of an article on "A Permanent Anglo-American Treaty," *Atlantic Monthly*, January, 1905. He is a member of the International Law Association of London, Chicago Bar Association, Chicago Law Club, Military Order of Loyal Legion, University Club of Chicago, Yale Club of New York, Board of Managers of Y. M. C. A. of Chicago.

The following circular letter has been received from the Committee recently formed in New York City for the purpose of securing clerkships for graduates of Yale in law offices:

TO THOSE DESIRING CLERKSHIPS IN NEW YORK CITY LAW OFFICES:

The undersigned Committee invites all graduates of Yale, of whatever Law School, who desire positions in New York City Law Offices to send their names and addresses, with a stamped and directed envelope, to the Secretary of the Committee. A registration blank will thereupon be forwarded, which should be returned to the Secretary properly filled out. An attempt will be made to put applicants in touch with those desiring their services.

The Committee gives its services and no charge of any kind will be made.

ROBERT W. DE FOREST, '70.  
FREDERICK TREVOR HILL, '87.  
CHARLES P. HOWLAND, '91.  
ROGER S. BALDWIN, '95.  
THOMAS D. THACHER, '04.

Committee.

Address:

THOMAS D. THACHER, Secretary,  
Room 50, Post Office Building,  
New York City.

'72.—Henry C. Newton has recently been elected president of the People's Bank, of New Haven, Conn.

'74.—Henry F. English will be associated with Norris G. Osborn, '80, in the publication of the *New Haven Journal and Courier*, the stock of which was recently acquired by Colonel Osborn.

'76.—Professor Theodore S. Woolsey has presented to the University Library a handsomely bound set of the "Archives Diplomatiques" from 1861 to 1904. The set was obtained by Professor Woolsey with some difficulty from abroad.

'92.—At the annual banquet of the American University Club of Shanghai, China, held recently, Hon. L. R. Wifley responded to the toast "George Washington."

'95.—Governor Woodruff of Connecticut has signed the commission of Hon. Samuel J. Bryant as judge of the town court of Orange, Conn.

'97.—John R. Booth was toastmaster at the annual banquet of the Republican Club of Danbury, Conn., held at the Turner House, in Danbury, recently.

'97.—George W. Martin has been appointed an assistant district attorney by District Attorney Clarke of Brooklyn, N. Y.

'99.—Thomas F. Noone, as president of the Alumni Association of the Rockville High School, presided at the annual reunion held in that city recently.

'00.—Announcement is made by Dr. and Mrs. L. Duncan Buckley of New York of the engagement of their daughter, Miss Catherine Buckley, to Mr. Nathan A. Smyth of New York. Mr. Smyth is an assistant attorney in the office of District Attorney Jerome.

'01.—Wilfred C. Lane has resigned his commission as clerk of the United States Circuit and District Courts and commissioner for the Southern district of Georgia to accept the position of Referee in Bankruptcy at Valdosta. He will resume the practice of law at Valdosta and will be permanently situated there.

'01.—Mrs. Delia H. S. Buchanan announces the engagement of her daughter, Miss Lelia A. G. Surridge, to Edwin S. Pickett. Mr. Pickett is practicing law in New Haven, Conn., and is clerk of the Common Pleas Court for New Haven county.

'02.—Announcement has been made by George B. Mulgrew of New York City of the marriage of his sister, Miss Alice Mulgrew, to John L. Gilson, which took place April 17th, at 900 West End Avenue, New York.



'03.—Hal Crampton Bangs is with the law firm of Moran, Mayer and Meyer, American Trust Building, Chicago, Ill. His home address after June 1st will be Sheridan Road, Glencoe, Ill.

'03.—George T. Bickley's address is 403 Y. M. C. A. Building, Scranton, Pa.

'03.—At the recent elections held in Hartford, Salvator D'Esopo was elected an Alderman and a Grand Juror on the Republican ticket.

'03.—Captain Howard J. Bloomer has been appointed adjutant of the First Regiment, Connecticut National Guard.

'04.—George B. Ward is engaged in the practice of law at Hartford, Conn., with John W. Joy, under the firm name of Ward & Joy.

'04.—Morris Older has been appointed a member of the charity board of Hartford, Conn., by Mayor Henney of that city. Mr. Older is engaged in the active practice of law in that city.

'05.—The present address of C. R. Williams is 66 Pierrepont Street, Brooklyn, N. Y.

'06.—John William Joy has formed a partnership with George B. Ward, '04, under the firm name of Ward & Joy for the practice of patent law, with offices in the Sage-Allen Building, 902 Main Street, Hartford, Conn.

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## ADDRESS OF THE PRESIDENT OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS

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As the Association of American Law Schools was organized in 1900, we are assembled at the sixth annual meeting.

The Constitution requires this body to meet annually at the time and place fixed for the annual meeting of the American Bar Association. That Association finds its convenience served by holding its meetings the last of August. A more inconvenient time than this for university teachers could hardly be selected. Organizations composed of those connected with universities are accustomed almost without exception to hold their meetings in December. Then, too, the Bar Association may sometimes find its own advantages promoted by holding its meetings in a remote section of the country and at a place so distant from the schools represented in this Association as to cause serious inconvenience, because of the place as well as the time of the meeting. The suggestion is made that it may be well for our Association to consider the question of the expediency of so amending the Constitution as to invest the Executive Committee with discretion concerning the time and place of meeting.

Since the last meeting of the Association of American Law Schools, the death has occurred of three distinguished law teachers: Christopher Columbus Langdell, George Tucker Bispham and George L. Reinhard. Mr. Langdell, whose death took place at Cambridge on July 6, 1906, was professor emeritus of the Harvard Law School, and was eighty years of age. He became dean in 1870 and resigned the position in 1895. In 1903 Harvard University established, in his honor, a Langdell professorship. This was an unprecedented compliment for that university to pay to a living

man. And in 1906 Harvard named, while he was still living, its new law building "Langdell Hall." It can be said that there has been no law teacher in America who has attained a fame equal to his. This is due to the revolution which he wrought in the teaching of law. The Langdell system of instruction, adopted in its entirety by some schools and employed in part by many others, has made his name a familiar one to the profession in England and America.

Mr. Bispham had been for many years professor of law at the University of Pennsylvania. He died at Newport on July 28, 1906, at the age of sixty-eight. Since 1861 he had practiced law in Philadelphia, and at one time he was the counsel of the Pennsylvania Railroad. As an author of an admirable treatise on equity, his name was well known to law teachers and law students.

Judge Reinhard was dean of the law school of the University of Indiana. His death occurred at his home in Bloomington on July 13, 1906. He was accustomed to be present at the meetings of this Association and he freely participated in the discussions of this body. Law teaching was with him, as with Dean Langdell, a vocation, while with Mr. Bispham it was an avocation.

The question as to what standard of preliminary education should be required of students applying for admission to the law schools continues to be one of the most important subjects this Association can have before it. That any law schools in the United States should continue to admit students as candidates for a degree without regard to their preliminary education should be and is occasion for humiliation. The American Bar Association has said emphatically that, at least, a high school education should be required. It is impossible to understand how any school which desires to be esteemed can longer admit students without complying with this recommendation.

In the report submitted to the American Bar Association in 1903 by its Committee on Legal Education, that committee disclaimed expressing any opinion on the question whether a college degree should be required of students seeking admission to the schools. It regarded that question as distinctively one of university policy.

In England, Oxford University does not confer the law degree upon one who is not a graduate in arts, either of Oxford University or some university which Oxford is willing to recognize.

In Scotland, no university can confer the degree of LL.B. on anyone who has not already obtained an arts degree.

In Ireland, the LL.B. degree is granted after two years of law study to those who hold an A.B. degree.

In France, to be entered at the *École de droit*, the student is required to produce, *inter alia*, the diploma of *bachelier de lettres*, or, if he has not studied in France, an equivalent qualification.

No American law school has as yet conditioned its law degree absolutely in the attainment of an academic degree. Harvard in 1896-97 made the possession of such a degree necessary for matriculation as a regular student. But persons without such a degree can still be admitted at Harvard as special students, and can obtain the law degree if they attain a sufficiently high stand on the examinations. And the same rule practically exists at Columbia.

Yale University has recently announced that, beginning with the academic year 1909, it will require students to have had the equivalent of at least two full years of work of collegiate grade.

Two years of college work is also to be required, or is already required, by the law schools connected with the state universities of North Carolina, Ohio, West Virginia and Wisconsin, and by that of Trinity College at Durham, North Carolina. Within the immediate future, other schools will, no doubt, take similar action. With foreign universities insisting on the degree requirements, American universities cannot long remain content with a diploma from a high school as the admission requirement of their professional schools.

The discussion concerning legal education in the South which occurred at the meeting of the Association a year ago has seemed to make it desirable to bring to your attention the facts as to conditions which prevail in the states which lie south of the Potomac.

We will consider first the law schools established in these states, and then the rules by which admission to the Bar is regulated.

Alabama has one law school, that of the State University at Tuscaloosa. It has a two years' course, which was established in 1896. Any person of good moral character is allowed to matriculate. But if he is a candidate for a degree he must pass such examinations in English, United States history and general history as shall satisfy the faculty. The faculty are required to give their entire time to the school. The number of students enrolled is 39.

Arkansas also has one school, that of the State University. It is established at Little Rock. Its course of instruction covers a period of two years. Applicants are admitted "who are possessed of a fair English education, such as may be acquired in our public schools." By a recent act of the legislature all graduates of the law department of the State University are admitted to the practice

of law in all the courts of the state. The number of students enrolled is 46.

Florida has one, that of the John B. Stetson University at DeLand. The university obtained its charter in 1886, but the law school was not established until 1900. Its course covers a period of two years of thirty-three weeks each, and the number of students enrolled is thirty. Applicants for admission, if candidates for a degree, "must give satisfactory evidence of educational qualifications sufficient to enable them to pursue successfully the study of law." By special act of the legislature any person who is a graduate of the College of Law of the John B. Stetson University can be admitted to the Bar on motion in open court upon presentation of his diploma. Persons coming from other law schools, although they may have had a three years' course, must pass an examination in open court. The arrangement is not, I am informed, satisfactory to the Bar of the state, and seems to be a piece of special legislation intended to strengthen the hands of the law faculty of this particular university.

Georgia has three, that of the State University at Athens, that of Mercer University at Macon, a Baptist institution, and that of Emory College at Oxford, which is a Methodist institution. The law school of the State University has a two years' course, which was established five years ago. It requires applicants for admission to "pass a satisfactory examination upon the elements of an English education." In speaking of the abandonment of the one year course and the adoption of the two years' course, the authorities of the school say: "The wisdom, if not the necessity, of that action has never been doubtful. The only apprehension was that the prospective students of law would not appreciate the advantages, and that lack of sufficient numbers of students would impede the progress of the department. The result has shown that these apprehensions are groundless." At the time this action of the university was taken the other law schools of this state conferred the bachelor's degree at the end of one year's study, and their course is still a one-year course. It is also to be had in mind that, under the laws of this state, a student seeking admission to the Bar is not required to study for any prescribed period. It was under these adverse conditions that the law school of the University of Georgia took its advance step, and the success which attended it ought to encourage the remaining schools of the state to take the same step if they are not yet prepared to adopt the three years' course. It is said against the University of Georgia that it admits to its second year class

students who produce the certificate of a lawyer that they have studied law for a year. It is, of course, unsound to assume that a student studying in an office can make as much progress in a year as can be made by a student studying in a law school. But it must be said that while the University of Georgia will allow such students to enter the second year class, it only extends that privilege to those who pass an examination on the subjects of the first year.

The law school of Mercer University was established in 1875 and reorganized in 1893. While it has a strong faculty, Emory Speer, Judge of the United States District Court, being dean, it confers the degree of LL.B. at the end of one year of law study, and the catalogue makes no mention of any admission requirements.

The number of law students at the University of Georgia is 41, at Mercer University 46, and at Emory College 1.

Kentucky has four, the law school of the University of Kentucky at Lexington, that of Central University at Danville, the law school of the University of Louisville, the Jefferson School of Law, also at Louisville. All of these schools have a two years' course. The law school of the University of Louisville has been in existence for more than sixty years. The Jefferson School of Law was organized in 1905. Its sessions are held in the evening and cover a period of eight months, and it is the largest school in the state. Central University announces that no examinations are required for admission to the law school, and no entrance examinations seem to be required in any of the law schools of this state.

The law school of Central University has 20 students, Louisville University 35, the Jefferson School of Law 63, Kentucky University 25.

Louisiana has one, that of Tulane University at New Orleans. It is one of the oldest law schools in the United States and was established in 1847. The course is one of two years of six months each. But a student who has studied law for a year in an office may be admitted to the second year class. No examination for admission seems to be required. The number of students enrolled was 82.

The authorities of the Louisiana State University at Baton Rouge have decided during the present year to establish a law school and to open it in September. It announces a two years' course for the degree of LL.B. It will require all students who are candidates for a degree to possess a high school education or its equivalent.

Mississippi has two, that of the University of Mississippi, which is established near Oxford, and another which is connected with

Millsaps College. The course at the University of Mississippi covers two years of nine months each, and students are not permitted to take the two courses contemporaneously. Applicants for admission, "if not graduates of some college, will be required to exhibit satisfactory certificates of moral character" the catalogue announces. But nothing is said as to any examination being necessary for admission, and no preliminary examination is required by the law school of Millsaps College. The attendance at the University school is 58 and at Millsaps College 13.

North Carolina has four. The schools are those connected with the State University at Chapel Hill, with Trinity College at Durham, with Wake Forest College at Raleigh, and with Shaw University, which is also at Raleigh. They all have a three years' course. Shaw University is an institution established for colored men, and very few of this race apply for admission to the Bar of the state. The requirements governing the admission of students to the law schools are higher in this state than in any other state in the South. In this respect an example has indeed been set to the whole country. The law school of the University of North Carolina has, for twenty-five years, declined to confer the degree of bachelor of laws upon anyone who has not had at least two years of a college (academic) course. It thus leads all the law schools of the United States in first establishing a high requirement in the matter of preliminary education. The law school of Trinity College, which is a member of this Association and was established with an endowment in 1904, followed the example of the State University in also requiring its students to have completed the first two years of a college course. As Trinity followed the State University in this respect, let us hope that the latter may follow the example of the former and enter this Association. We should all be glad to welcome a school which a quarter of a century ago took such an advanced position in the matter of entrance requirements that not half a dozen schools in the entire country have even yet been able to do likewise.

The law school of the University of North Carolina has 104 students, that of Trinity College 16, of Wake Forest University 85, and of Shaw University 8.

South Carolina has two schools, both being established at Columbia, and each having a two years' course. The law school of South Carolina College exists for the white race and has 30 students. The law school of Allen University was established for the colored race. For the last few years it has had no students, but the President reports that there is a faculty which is ready to teach and that "they

will probably have a student or two next term." This law school has graduated about forty men, but there seems to be no great demand for colored lawyers in South Carolina. The catalogue, however, states that the majority of those graduated "are meeting with a great degree of success in life." No admission requirements are prescribed, the catalogue simply announcing that "a knowledge of the Latin language is a great help in the study of law, and a course in liberal studies is recommended."

Tennessee has six schools. The schools of the University of Tennessee at Knoxville, of the University of the South at Sewanee, of Vanderbilt University at Nashville, and of Grant University at Chattanooga, have a two years' course. Walden University law school in 1905 established a three years' course, and is the only school in the state which has such a course. It is a school for colored men and its catalogue states that it "is the only leading law school in the whole South for the education of colored attorneys." The school was organized in 1877 as the law department of Central Tennessee College and in 1900 the name was changed to Walden University. It is established at Nashville. Applicants for admission must give evidence of good moral character and that they have attended some reputable high school, academy, normal or college preparatory school for at least two years.

The law school of Cumberland University at Lebanon has a course of one year for the degree of LL.B. This is one of the oldest schools in the country, having been established in 1847. It has no entrance requirements and publicly advertises the fact in the newspapers. The result is that it enrolls more students than any other school in the state. The catalogue for 1906 does not show that a single student was enrolled who possessed an academic degree. The total enrollment was 118, and of this number 27 are credited with "taking a partial course." The law school of the University of Tennessee enrolled 62, Grant University 60, Vanderbilt University 46, the University of the South 18, and Walden University 4.

The law school of the University of Tennessee requires all applicants to have had a high school education. That of the University of the South states "that the requirements for admission to the university apply to law students; yet, for entry to the junior class students of mature age and earnest purpose may not be held to rigid examination." Vanderbilt University announces that applicants are "not required to undergo a special examination, but must satisfy the faculty of their fitness to undertake the work." Grant University says that applicants "will be expected to furnish satisfactory evi-



dence of at least a fair education in the common branches." It adds that students who have no diplomas from a college, academy or high school, but "who are able to pass an examination testing ability to read law books intelligently and comprehend law lectures will be admitted."

The law school connected with the University of Tennessee has been a member of this Association until the present year, when its membership is forfeited under the constitutional provision which now makes a three years' course essential to membership in this body. It is a source of regret that the University of Tennessee has not seen it possible as yet to place its law school upon the three years' basis. The dean of that school, who is so well known to all of us, is anxious for a three years' course, as is the dean of the law school of Vanderbilt University. They have the best wishes of this Association for the speedy realization of their ambition. We hope that it will not be long before the representatives of each of these schools will be sitting in the councils of this Association.

Texas has two schools. The law school of the University of Texas is a member of this Association and is the largest school in the South, having 247 students enrolled. It has a three years' course, adopted three years ago. Candidates for admission must have had a high school education. The change from a two years' to a three years' basis did not, after the first year, decrease attendance. A law school was established in 1893 in connection with Fort Worth University. Its catalogue fails to show that any students were in attendance during the past year. It also fails to show the length of the course and the nature of the examination of applicants for admission.

Virginia has three schools, that of the University of Virginia at Charlottesville, the Washington and Lee University at Lexington, and the College of Law at Richmond. The law school of the University of Virginia was opened in 1826, the year after that of Yale University. The school connected with that of Washington and Lee University was founded in 1849. The Richmond College of Law was established in 1870 and existed until 1882, when it was discontinued. It was re-established in 1890. All three of these schools now have a two years' course. The University of Virginia has had such a course for a number of years. But the two year rule goes into effect at the Washington and Lee University with the academic year 1906-07. And the Richmond College of Law has also just established the two years' course. Students who enter the law school of the University of Virginia must have had a high school

education. The law school of Washington and Lee University announces that "no entrance examinations are required for admission into the law school, but it is expected that all students applying for entrance shall have had at least the advantages of a good English education." The Richmond College of Law states that "each applicant for admission must give evidence of fair general education."

The law school of Washington and Lee University asserts in its catalogue that inasmuch as each class is given "about" fifteen hours of lectures each week the amount of work prescribed "nearly or quite equals that required in those institutions which allow three years to their courses." But there are a number of three year schools, of which Yale is one, which prescribe fifteen hours of work for each of the three years. It will not do to attach too great importance to the fact that one school prescribes ten hours of work, as at Harvard, or fifteen hours, as at Yale, if only the course be a three years' course with due opportunity for reflection and assimilation. Three years of ten hours of prescribed work in each year is certainly far more valuable to the student than two years of fifteen hours of prescribed work. That fact should never be lost sight of either by instructor or student. The catalogue of the Richmond College of Law makes a strange misstatement. It announces that there is no law school in the South, except two colored schools, which is eligible for membership in the Association of American Law Schools, as there is none having a three years' course. The Law School of the University of Virginia has 200 students enrolled, and is the second in size in the South. Washington and Lee has 75 and the law school at Richmond 34.

West Virginia has but one law school, that of the State University at Morgantown. This law school has a two years' course. Its admission requirements are the same as those prescribed for admission to the College of Arts and Sciences. It confers the degree of LL.B. only upon those who have had two years of a college course. To all others it grants simply a diploma. Its last catalogue shows that forty-three students were candidates for a degree and twenty-four for a diploma. Not only does the diploma or degree of the school admit to the Bar of the state, but the faculty is constituted a state commission to examine all applicants for admission to the Bar. No other state entrusts to the faculty of a law school the right to pass upon all applicants. The objection to such a provision is that a faculty might be inclined to favor its own students and admit them to the Bar with too little of preparation, while at the same time it excluded others whose knowledge of the ! w

might, at least, equal that possessed by some of those to whom the license is granted. This Association and the American Bar Association has several times gone on record as opposed to candidates being admitted to the Bar on a law school diploma. The practice is a vicious one, and tends to low standards in the schools. The West Virginia idea goes a step farther and gives a law faculty not only the power to admit its own students, but, in addition the right to exclude those who are not. No law faculty should possess any such authority. It seems to be indefensible from any point of view.

To summarize results, there are in the states south of the Potomac thirty law schools which had during the past year a total attendance of about 1542 students. These states, according to the census of 1900, had a population of 22,081,639. The population of the whole country was 76,303,387. If we assume that the number of law schools in the United States was approximately 125, and that the total of students in law schools was about 15,000, it will be seen that these states have less than a proportionate share of the law schools of the country, and that the number of students in the schools is proportionately much less in these states than in the states of the North. Indeed, the small number of students in the law schools of the South as compared with the number in the schools of the rest of the country is a fact of no little significance.

That there should be in these states only five law schools having a three years' course of study for the bachelor's degree, and that two of the five should be schools for the colored race, are facts which also are not without significance.

That a number of the schools have recently abandoned a one year course and come to the two years' basis is a subject for congratulation. That there are even two or three schools left which persist in maintaining a one year course for the degree is a surprising, and I may add with truth, humiliating fact.

Another striking fact in connection with the law schools of the South is that in so few of them is attention paid to the preliminary education of students seeking admission to the schools.

If we examine the rules which govern the admission of students to the Bar in the states of the South, we shall find some explanation of the fact that there are so few students in Southern law schools.

No definite period of law study is prescribed in Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, Tennessee, Texas or Virginia.

Two years are prescribed in North Carolina, South Carolina and West Virginia.

The prevalent theory in the South is that justice requires that an applicant for admission should be allowed to show at any time that he is qualified to pass the examination, and that as a bright man can prepare himself in less time than a dull one, he should not be shut out by any fixed rule as to time. This theory has long been rejected in the Northern States. It has been repudiated by the American Bar Association, which has gone on record in favor of a three years' requirement. The Southern rule fails to recognize the fact that while a student may in a comparatively short time "cram" for an examination, the knowledge which he thus acquires is of very little value to him and is lost almost as soon as it is acquired. The interests of the commonwealth are not subserved, but very seriously injured, by the admission of incompetent attorneys to the Bar. Cases are mismanaged, the interests of clients sacrificed, the expenses of litigation enormously increased and the courts burdened as a result of this short-sighted and mistaken policy. The judgment of the profession in this country and abroad is that three years is none too long a time to enable the student to prepare himself properly for admission to the Bar. If less time is devoted to the work of preparation, it becomes a process of "cramming" to pass an examination and no adequate time is afforded for proper digestion and assimilation of legal principles. Rules must be made for the average man and not to accommodate an occasional genius. If the three year rule now and then operates to the prejudice of a genius, it is better that it should be so than that a rule should be established for his accommodation, which works evil to all others and to the commonwealth. Law professors in the South should take the lead in their respective states in creating a sound opinion within the profession on this important subject. So long as students can come to the Bar by "cramming" for an examination in a three months' study of the law the difficulty of bringing the law schools to a three years' basis in any state which tolerates such conditions is very manifest.

Again, no examination on literary subjects, but only on legal ones, is demanded of applicants for admission to the Bar in Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Virginia. The Supreme Court of Texas, however, lays down the following rule: "Since some general education is necessary to a practice of law, it shall be the duty of the Board of Examiners to reject any applicant who, in their opinion, may show himself so deficient as not to be capable of performing the duties of an attorney."

In West Virginia all applicants must have had at least a high school education.

It is impossible to understand why in the states named the profession tolerates the condition which prevails, and under which men come to the Bar without any adequate preliminary education. It certainly is not in the interest of the profession, or in that of the commonwealth, that men without education should be admitted to the Bar. That it is not in the interest of the men themselves is also certain, but if it were otherwise it would be impossible to justify the sacrifice of the dignity and welfare of the profession and of the state's weal in order that a few individuals, unfit and undeserving, may find an easy access to the ranks of a great and honorable profession.

The fact that men can come to the Bar of these states without being subjected to any test as to their preliminary education explains why in so many of the Southern law schools, even in those connected with reputable universities, no entrance requirements are prescribed. That the law schools are not justified in conferring their degrees without regard to the preliminary education of the recipients by the failure of the state to subject to such a test those who seek admission to the Bar is clearly evident. But the absence of such a test on the part of the state embarrasses the schools in establishing a high school education as a condition of admission to their classes in accordance with the recommendation of the American Bar Association. When a Southern school, in the absence of any state test, establishes a high preliminary requirement, as has been done by the two schools in North Carolina, the action, I am sure, commands our enthusiastic appreciation. Let us hope that our brethren, the law teachers of the South, will also take the lead in their respective communities in demanding that a suitable state test be prescribed as to the preliminary education of all applicants for admission to the Bar. May we not hope that whether or not they at once succeed in securing this reform in the state law they will steadily advance the standard of their own schools, and conform to the recommendations of the American Bar Association.

A federal judge living in the South gives the following explanation of the reason why the law schools in his state cannot adopt a three years' course, and as he is also the dean of a law school, his opinion has additional significance from that fact:

"The principal reason why, in my opinion, the law schools of — cannot come to the three years' basis now requisite in so many Northern schools is that, while we have widely diffused pros-

perity, we have comparatively few men who are pecuniarily able to give their sons collegiate training and a professional training of more than one year. It is usually true also that the sons of the wealthy who have the means of adopting a longer novitiate prefer the more renowned schools, such as Yale, Harvard, Columbia and the like."

If the distinguished jurist is correct in assuming that there are few men in the South who have the means to give their sons more than five years of educational training after the completion of a high school course, he nevertheless falls into a decided error when he assumes that a proper division of this time is to assign four years of it to the college course and one to the professional school. A much wiser distribution of it would be to give two years to the college course and three years to the professional school.

I venture to think also that the law schools of the South should not plan their work to accommodate the few spoken of by the judge whose words have been quoted, unless they are prepared to insist on a college degree as a condition for graduation in law. So long as these schools do not even demand a high school education as a condition for admission, why should they refuse the vast majority of their students the benefit of three years of sound professional training and put them off in many cases with but one year of such training in order to meet the convenience of the comparatively small number of college-trained students who enter their classes?

The real explanation of existing conditions is not the poverty of the South, but the indifference with which this subject has been regarded by the profession in that section of the country. At the close of the war the South was certainly in a pitiable condition of poverty; the people had lost their slaves, their lands had depreciated in value, and their wealth had been destroyed. But forty years have passed since the war ended and there is a New South. That section has wonderfully prospered. Its industries have become diversified, and every department of life has improved. The whole South has been covered with a network of railroads. Its lands have been brought to a higher state of cultivation than ever before was known. Its crops have been more diversified. Everywhere are telephones and electric lights. It has made great progress, too, in education and in the building up of a system of common schools. But the progress in professional education has not kept pace with the progress made in other directions. Here and there have been men like Ward Hunt, of Louisiana, Dean Lile, of Virginia, and Dean Ingersoll, of Tennessee, who have lifted up their voices and appealed

for higher standards. But their appeal has been in the main unheeded, and their voice has been as of one crying in the wilderness.

Throughout the South generally admission to the Bar signifies little. The examinations are as a rule notoriously and discredibly lax. In a report made to the Tennessee Bar Association in 1899, by its Committee on Legal Education, the condition existing in that state was described as follows:

"A license to practice law, procured in Tennessee, imports nothing either as to the character of the holder or his professional acquirements. The examinations for admission to the Bar, as conducted in this state, are notoriously loose. It is generally accepted that almost any person can, in one way or another, get a license to practice law in the State of Tennessee."

At a meeting of the Virginia Bar Association in 1901 the dean of the law school of the University of Virginia stated that in Virginia any young man could in three months qualify himself to stand the examination for admission to the Bar of that state. No one called in question the truth of his statement. The Committee on Legal Education had reported in favor of changing the rules so as to require an applicant to study law for two years and also to authorize the Court of Appeals (which conducts the examination of all applicants) to reject any candidate if it should discover from his papers that his general education was so deficient as to make him obviously unfit to enter the profession. In explanation of this last provision, it was stated that the court paid no attention to an applicant's general education or the lack of it as it did not feel authorized under the existing rules to do otherwise. The report, which I am confident we will unanimously agree, was very conservative, provoked a prolonged discussion and an opposition which was so general and pronounced that the Association found it desirable to adjourn without taking further action than to postpone its further consideration until the next year. Nothing has ever been heard of it since. Its advocates were so discouraged that they have never yet ventured to bring the matter again to the attention of the Association. The Chairman of the committee making the report was Dean Lile, of the University of Virginia, who said at the time that he desired to go very much further than the recommendations, but that he abstained, as he did not wish to "shock" the Association. I venture the opinion that what the Association most needed was a "shock," and that even this very mild one, which it certainly received, did good, although no tangible result has yet come from it.

At a meeting of the Bar Association of Georgia, in 1902, Chancellor Hill of the State University, referred to the fact that a young

man in that state had recently passed the Bar examination after thirty days' study. And he stated that numerous instances were known of applicants passing the Georgia examinations "after studying during six months or less."

A discussion in the Bar Association of Texas, in 1900, sheds considerable light on conditions in that state. One of the professors of the law school of the State University declared that persons were being constantly admitted to the Bar of Texas who were without qualifications. "Many of these young men," he said, "secured license by knowing what questions would be asked and through the kindness of some friend on the board of examiners who would say, 'Oh, he is a common sense fellow; he will make a lawyer some day.'" And the President of the Association, in 1894, in his address declared that in his experience of nineteen years he could only call to mind one applicant who had been rejected. In 1903, the Committee on Legal Education reported in favor of requiring all applicants to be examined on literary subjects, but the Association after a lengthy discussion rejected the recommendation. One member, who could not conceal his contempt for the suggestion that applicants should pass an examination in elementary Latin, announced that the dead languages were dead and had been dead for a long time; that he had never derived any benefit from them, and that he would not know them if he met them in the street. All of which may have been true without impairing the wisdom and value of the committee's recommendation. But in his mind it settled the matter conclusively and at once against the report. Another participant in the discussion was one who could see no reason for expecting a lawyer to know anything about history, as he himself was unable to tell, as he said, "without severe deliberation," whether James the First followed the First Charles or the Second. He frankly confessed that he did not believe it made an iota of difference whether James died before Charles was born or was born after Charles died. Still another, again recurring to the Latin recommendation, effectually disposed of it by saying that Judge Beckley, of the Supreme Court of Georgia, "don't know any more about Latin than a pig, and yet he is acknowledged to be, perhaps, the greatest living judge in the South to-day." Having disposed of the Latin recommendation in the manner indicated, he next gave attention to the recommendation as to mathematics. Declaring his conviction that a knowledge of mathematics had no bearing whatever on one's qualifications to practice law, he demonstrated the truth of his assertion by saying: "I bet there are not two lawyers present who can define that word



'quadratics.' I know I can't. Talk about requiring that examination, I bet there are not five lawyers present who can define what it means, or care what it means." But a member of the legal profession surely ought to be a man possessed of some general culture, and no one should come to the study of the law with faculties not trained by previous study.

In South Carolina, prior to 1879, a person was not required to pass any examination if only he had studied law for two years in a lawyer's office, or had been graduated from some reputable law school. But in that year an act was passed requiring an examination in all cases. In a report made to the Bar Association of that state by the Committee on Legal Education, in 1904, attention was called to the fact that no preliminary examination on literary subjects is required. The committee considered the absence of such a test as a defect in the law, but made no recommendation for its amendment. It did, however, venture to say that it felt "satisfied that, if the time be not now ripe, in the near future the requirement of preliminary education, before the student enters upon his law course, will be insisted upon, and such requirement enacted into law." If in a state which has produced a Calhoun, a Petigru and a Legaré the time is not yet ripe for insisting that men who come to its Bar shall have a reasonable education, the fact is indeed deplorable.

It is a rather remarkable fact that some of the most strenuous opposition in the South to any advance of standards, even when demanded by the Bar, has come from the law schools themselves. Thus, in North Carolina, when the Committee on Legal Education reported in favor of requiring all candidates for admission to the Bar to study law for two years the dean of one of the law schools opposed it very vigorously before the State Bar Association. He asserted that those who had already been admitted into the temple were endeavoring to close up the entrance and make it "a little wicker gate through which the young men of North Carolina pass before they come out into the forum." After a discussion, which continued for two days, the Association adopted the recommendation, and the Supreme Court later made the change as requested.

In Georgia, the State Bar Association has taken action twice within the last six years in favor of changing the law of the state so as to take away the right of admission on the diploma of a law school, except in the case of schools having a two years' course. A bill to that effect was introduced into the legislature in 1904, and

was defeated because of the opposition of a one year school which claimed that the time was not ripe for such a change.

The officials of law schools who oppose an advance in the standards governing admission to the Bar prejudice the interests of their own schools. Experience has shown that an effect of increased admission requirements is to diminish the number of students studying in offices and to increase proportionately the number who resort to the schools. The reason why there are comparatively few students in Southern law schools is that admission to the Bar in the Southern states is so easy a matter that the young men entering the profession think it unnecessary to avail themselves of the opportunities which the schools afford. When the Bar examinations are made severe, and candidates are required to study for a period of two or three years, the Southern law schools will not want for students and the necessary income for the payment of salaries will be forthcoming.

Before concluding this address, I desire to call attention to the matter of the law degrees. The old Litchfield Law School, at Litchfield, Connecticut, the first to be established in the United States and which was founded in 1784, never conferred degrees. Neither did the Northampton School, at Northampton, Massachusetts, which was opened in 1823. These schools were not incorporated, and consequently had no power to give degrees. The degree of bachelor of laws was conferred for the first time, in the United States, in 1820, when Harvard University bestowed it upon six graduates. The Yale Law School, which dates from 1824, and next to Harvard, is the oldest of the existing law schools in this country, did not confer the degree until 1843. The law school of the University of Virginia, which came next, being established in 1826, began conferring law degrees in 1840. The original policy of that university was adverse to the entire degree system, and it was not until 1848 that it consented to confer the bachelor of arts degree.

The degree conferred by most law schools in this country is that of LL.B., although some few schools confer the degree of B.L.

In Scotland, a distinction is made between these degrees. The LL.B. degree was in that country originally created by the university commissioners, appointed under the Universities Act of 1858. The ordinance of the commissioners establishing the degree was passed in 1863, and the degree was first conferred in 1864. The B.L. degree was instituted in 1874. In that country the LL.B. degree is essentially an academic and scientific distinction. It implies a considerable amount of general culture, because no one is eligible as a

candidate for the degree unless he holds the degree of master of arts (or its equivalent) of a recognized university. It entails a course of study and examinations in a wide range of legal subjects, which includes several subjects not ordinarily required for professional purposes, such as jurisprudence, international law and constitutional history. In contrast with the LL.B. degree, the B.L. degree is regarded as a distinctly professional degree and one standing on a lower level. It was designed for those students who have not much time for general education or for the study of the scientific branches of the law. The intention regarding that degree is to restrict it to those whose aim in attending law classes is distinctly practical. Candidates for this degree need not be graduates in arts, but have only to satisfy some very moderate requirements as to general knowledge and to pass an examination in legal subjects, which is almost exclusively restricted to subjects of a purely practical and professional nature.

In England, the law degree given at Oxford is that of B.C.L., while at Cambridge it is LL.B. Before the Reformation degrees were given at Oxford and Cambridge *in jure civili, canonico* or *utroque*. When the universities discontinued the teaching of canon law the law degrees were *in jure civili* only. The abbreviations LL.B. and LL.D. (*legum baccalaureus, legum doctor*) are said to have come into use in England some time in the seventeenth century and they ultimately prevailed at Cambridge, but not at Oxford. But even at Cambridge the full official style was *in jure civili* down to 1858. But in his Cambridge legal studies (p. 61) Mr. Clark cites the statutes of Edward VI, 1549, in which it was provided that the *studiosus legum* is to read the *Institutiones* privately for a year, then to attend the lectures of the *publicus juris prælector* for five years and to keep certain exercises before becoming *baccalaureus juris*. The *legum baccalaureus* is to attend a further course of three years and after more exercises to be chosen *doctor legum*. The *doctor legum* is, after his doctorate, to apply himself to the *leges Angliæ*.

Only a few years ago the whole country was scandalized by the sale of degrees by a man called Farr, who operated under a charter procured under the laws of Tennessee for a National College of Law. This notorious individual granted degrees for twenty-five dollars to those who were willing to pay for them. His operations were not confined to Tennessee, but he flooded the country with letters proposing to confer the honorary degree of doctor of laws for "the incidental fee of ten dollars." The parties addressed were

requested to forward the fee and answer certain ridiculous questions of which the following are illustrations:

"Are you married or single?"

"Do you believe in the coeducation of the sexes?"

"Do you take daily exercise?"

"What is your political belief in national affairs?"

After he had been engaged in this business for several years and been exposed in the newspapers, the Tennessee Bar Association denounced him as "an ignorant tyro, charlatan and fakir," and pronounced his college of law as "an arrant fraud and humbug."

At length proceedings were commenced upon the relation of the Bar Association of the state, and the charter of "The National College of Law" was forfeited. Thereupon, for a time, he continued his nefarious work under the name of "The Nashville College of Law" and "The Nashville College," for he had three charters from the state. His operations were finally brought to an end by indictment and conviction in the United States Circuit Court for the Middle District of Tennessee. He was indicted for making a fraudulent use of the mails and, upon conviction, was sentenced to four months in jail and to pay a fine of five hundred dollars and costs. The sentence was suspended until the further order of the court, upon the condition that the man pay into court twenty-five dollars and file an affidavit showing his inability to pay the fine and setting forth the fact that he would never at any time again engage in any such educational scheme. This he promptly did, and he has ever since been in retirement.

In 1897 an exposure was made of the operations of "The National University of Chicago." This institution existed only on paper, and for a money consideration it scattered its degrees not only over the United States, but extended the scandalous traffic to England, Germany and India. Its conduct was denounced in the British Parliament, and the board of administration of Oxford University called public attention to its misdemeanors. The papers of Germany discussed the matter under the head of "American Diploma Swindlers."

American degrees have been brought into such disrepute in Germany that when Andrew D. White was ambassador of the United States at Berlin they were made a feature of a comedy which he witnessed at the Royal Theater in that city.

The difficulty is that in the United States there is no supervision over the degree-conferring power. General laws exist in almost all our states which permit even the most irresponsible

persons to incorporate and confer degrees. An extreme instance of the extent to which the abuse has been carried is shown by a statement made upon reliable authority that in "the good old reconstruction days" of Louisiana a few men organized themselves into a board of trustees of a university in that state, and met and elected officers. At this the first and only meeting the board ever held the secretary moved that the degree of LL.D. be conferred upon the president. This was carried, and then the vice president moved that the same degree be conferred upon the secretary. This was likewise done, and before the meeting adjourned the degree had been conferred upon each member of the board. An adjournment followed and the trustees never reassembled.

Legislation is necessary, not merely as a protection against palpable fraud, but as against institutions with a real faculty and curriculum of study, but with such low standards of admission and graduation that their degrees do not represent those attainments in learning which justify the honors conferred. In Europe state supervision is provided, but in this country there is little or no check on the abuse of the degree-conferring power.

A degree has a legal sanction and authority. According to the courts the power to confer it is derived from the legislature. (5 Wendell 211-217; 3 Wharton 445; 62 Vermont 373.) Degrees "confer honor, influence and respectability to a certain extent." A degree in law, or medicine, or dentistry, or pharmacy is, in some states, "a valuable property right of great pecuniary value." To confer degrees upon the illiterate and unworthy is to destroy their value and bring reproach upon the whole degree system. The abuse of this degree-conferring power has been likened by the courts to the witty French minister who threatened to create so many dukes that it be no honor to be one, and a burning disgrace not to be one.

It is full time for this Association of American Law Schools and for the American Bar Association also, to go on record on this important subject and initiate a movement to secure, so far as may be possible in all the states, a uniform law for the protection of the law degrees. The right to confer the LL. B. degree should be prohibited to schools which do not require a high school education for admission and a three years' course of study for graduation. Other schools should have the authority to grant simply the degree of B. L., or perhaps the right should be restricted to the two-year schools. The right to confer the degree of L. M. should be restricted to those schools that have the

right to confer the degree of LL. B., and which require an additional year's work done in residence. The degree of LL.D. should be made by law a purely honorary degree to be conferred simply *causa honoris*. The degree of J. D. should only be conferred by schools having the right to grant the degree of LL.B., and should be bestowed only upon those who have obtained a degree in arts or science. Recommendations to this effect will go to the Bar Association on Thursday, from Committee on Legal Education. It is to be hoped that that Association and this Association will co-operate in the accomplishment of this great reform.

It is impossible longer to view with complacency the conferring of the LL. B. degree for one year, or even two years of law study. Now that there are sixty-four law schools in this country which grant it only to those who have studied for three years, it is not less disturbing to find schools conferring the master's degree in law at the end of a second or third year.

*Henry Wade Rogers.*

## THE KNIGHT COMMANDER CASE

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Although but one of several instances of the same sort, involving the question of the legality of the destruction of a neutral ship by a belligerent, the sinking of the *Knight Commander* excited so much adverse comment in England at the time and has given rise to so much discussion since, as to make it a test case, one upon which it is convenient to base an inquiry.

The essential facts concerning ship, cargo and voyage are as follows: She was an English merchant steamer; she carried a mixed cargo which included flour and railway material; her route was from New York to Manila, to Shanghai, finally to Yokohama; she was visited by the Vladivostok squadron off the Japanese coast; the Russian officers declared the cargo to be contraband but owing to the ship's lack of coal she could not be taken before the Vladivostok prize court for trial; the crew was accordingly taken off and the ship sunk. The ship's papers were lodged with the prize court sitting at Vladivostok, a trial was held and the destruction of the ship justified. An appeal was entered by the British owner and damages asked for on account of the cargo as well; the case tried before the Russian Council of Admiralty, but the decision of the lower court affirmed by decree of November 19, 1905.\*

In examining the legality of this destruction, the first step is to emphasize the distinction between a neutral and an enemy ship as subjects of such casualty. In our Civil War, Semmes in the *Alabama*, having neither prize crews to spare, nor ports open to him, burned a majority of his prizes and has been generally justified in so doing. This is not a similar case. It is lawful to seize enemy's property at sea, merely because of its ownership. Self interest will dictate the making beneficial use of such

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\*Decided: 1. To maintain the decision of the Vladivostok Prize Court and to leave the appeal made by Attorney Bojenoff in behalf of the owner of the steamer *Knight Commander* without consideration.

2. To leave the petitions of the Attorneys Sheftel and Berline in behalf of the cargo owners of goods non-contraband of war, and for compensation for losses, with examination.

property if it can be carried *infra praesidia*; if not it may be destroyed. But it is not lawful to seize the property of neutrals unless it is engaged in a forbidden trade. As there was no claim that either the *Knight Commander* or its cargo were Japanese property, the reason above given to justify destruction, viz.: that it was enemy's property, is inapplicable.

Of all forms of forbidden trade, perhaps the carrying of contraband is the most common. The rule governing this traffic is very clear. The *onus* of prevention rests upon the belligerent injured by it, the neutral state merely warning its own subjects of the risk of confiscation involved. To make goods contraband, they must be shown to be directly available for carrying on war and also to have a hostile destination. For instance, gunpowder bound for the German colony of Kiao Chau would not have this character. The ship is not involved in the penalty, nor the non-contraband portion of the cargo, unless under exceptional circumstances which prove complicity, such as identity of ownership or such a preponderance of contraband in the cargo as to argue the voyage to have been undertaken for its sake, to argue complicity. But ordinarily the ship is not confiscated with the guilty portion of the cargo. It is important to bear this in mind. Now this statement of the rule, making it essential to know the character of the goods, the ownership of the entire cargo, the ownership and final destination of the ship, shows the need of a searching investigation and one of a truly judicial nature before condemnation can take place, lest injustice be done. And so the final condition of the infliction of penalty for carrying contraband is that sentence must be passed upon it by a prize court.

We are now ready for our real inquiry which is twofold: may neutral contraband be lawfully destroyed at sea without judicial condemnation under any circumstances; may it be so destroyed subject to compensation, the *Knight Commander* being taken as a case in point.

These are the considerations involved:

- (1) The injustice of penalizing a ship not shown to be guilty.
- (2) The insufficiency of an *ex parte* examination of cargo at sea.
- (3) Validity of excuses for destruction.
- (4) The doctrine of conditional contraband; its application to this cargo.
- (5) Is destruction ever permissible?
- (6) Is destruction lawful subject to compensation?

Let us examine these questions seriatim; certain being capa-



ble of determination by the light of reason solely, while others rest upon precedent and the opinions of jurists.

So far as I am aware the injustice of destruction attaching as a penalty to the neutral ship, even granting that it is carrying contraband, has not been sufficiently emphasized in the *Knight Commander* case.

The argument is this: To condemn a ship carrying contraband it must be shown that it belonged to the owner of the contraband or that the contraband formed so large a portion of the cargo as to prove complicity. This is an intricate business of a highly judicial nature, demanding the production of papers and examination of witnesses. It will be later shown what grave doubt existed as to the really contraband character of the cargo in question. But laying this aside, the case in point shows us a penalty, namely, the loss of the ship, which according to the accepted rules governing contraband would not have been inflicted by any well-regulated prize court, unless the owner of the ship was shown to be the owner of the cargo as well, as to which there is no proof that the searching officer made inquiry. Thus we find this case to involve an enlargement of the accepted penalties for carrying contraband.

2. The vast difference between the cursory *ex parte* judgment upon all the facts in a ship's case, and a judicial examination of the same is also to be noted as a sound reason against the practice we are considering. In port, the cargo can be landed, its character ascertained, its ownership inquired into, the ship likewise investigated, its destination learned and witnesses summoned in proof of all, beside that evidence which the ship's papers give. This trial, before a court trained to judge the credibility of evidence, if properly conducted, creates so strong a presumption of guilt or innocence that few governments will venture to challenge its verdict. It must be admitted that the prize court of first instance sitting at Vladivostok seems to have been scarcely a judicial body; it seems to have existed for condemnation only. This apparent blemish upon the Russian judicial system may lower the Vladivostok court in our eyes but it will not thereby raise the navy officer into a satisfactory judicial position. He cannot unload the cargo; he at best can only guess the uses of the cargo; its ownership and that of the ship are shown to him by the ship's papers, not by outside evidence; he assumes judicial functions without being in possession of the facts or having a judicial mind. It is as if the sheriff were to judge the guilt of a

supposed criminal whom he had arrested, and not only impose sentence but execute it on the spot even to the death penalty. This evident misplacing of the judicial function is a strong argument against the legality of the act under review. This was keenly felt in England by the government. The Marquis of Lansdowne said, in the House of Lords, July 28, 1904, "Upon no hypothesis of International Law can we conceive that a neutral ship, even if it be ascertained that her cargo included contraband of war, could be destroyed in this manner upon the mere *fiat* of the commanding officer of the capturing squadron and without reference to a properly constituted prize court." (London Times, July 29, 1904.)

And the same day in the Commons, Balfour characterized the practice as follows: "Evidently if it is left to the captain of a cruiser to decide on his own initiative and authority as to whether the particular articles carried by the ship do or do not belong to the category of contraband of war, what is not merely the practice of nations but what is a necessary foundation of equitable relations between belligerents and neutrals, would be cut down to the root." He was speaking generally, but went on to say specifically of the *Knight Commander* case, "In our view that is entirely contrary to the accepted practice of civilized nations in the case of war."

3. What were the excuses for a failure to carry the alleged prize before a court for trial?

The justification seems to have been founded upon certain clauses in the Russian prize regulations issued March 25, 1895. These stipulated that "in extraordinary cases where the saving of a seized vessel is rendered impossible by its bad condition, its low value, the danger of its being retaken by the enemy, the fact of its being at a considerable distance from Russian ports, or the ports being in a state of blockade and dangers threatening the capturing vessel or its operations, the naval commander may on his own responsibility burn or sink the vessel seized after having landed the persons on board and as far as possible the cargo, as well as having taken other measures for the preservation of papers and other articles on board likely to be required" at an investigation before a prize court. A statement by the naval commander responsible for the act was also provided for. Now according to a dispatch in the *London Times* of August 3, 1904, Vice-Admiral Skrydloff telegraphed his Czar that the *Knight Commander* could not be sent to port to be tried owing to her lack of coal.

Here there are three things to be remarked: first, that the ship being sunk, her sufficiency of coal to carry her several day's sail beyond her destination could neither be proved nor disproved.

Again, although these regulations might justify the Russian Admiral, they could not excuse the Russian government unless they can be shown to be in conformity with usage.

And thirdly, there is nothing in these regulations so far as noted, to show whether they were really intended to apply to neutral vessels, it being usual for states to prescribe rules as to the treatment of enemy vessels, destruction amongst them.

That the eminent Russian publicist Professor de Martens, twenty years before had excused the destruction of prizes is recalled by Professor Holland, he alleging the distance of Russian ports from the scene of possible naval operations, so that what other states will resort to only in extremity, will become for Russia the rule, though frankly admitting that such a practice would raise against his country universal dislike—yet even here there is no certainty that destruction of neutral prizes is included in this claim.

4. Hitherto we have gone on the assumption that the *Knight Commander* contained some contraband. It is now in order to examine this question. Her cargo, by the *London Times* report, was said to be "rails, rice and flour." Admiral Skrydloff wired that railway material made up a considerable part of the *Knight Commander's* cargo. Assuming that she carried railway iron and breadstuffs, bound for an enemy's port, namely, Yokohama, could these by the accepted usage be held to be contraband? This brings up the doctrine of conditional contraband. Very briefly this means that articles capable of use in peace as well as war, must have their intended military availability and purpose shown to render them guilty. Thus according to this doctrine the railway plant carried by the *Knight Commander* would be contraband only if it could be shown to be intended for military use in Korea or Manchuria. As its destination was Yokohama this would be difficult. So likewise the foodstuffs on board unless intended specifically for army use, must be held innocent. Without going at length into this doctrine it is enough to say that it was originated by Lord Stowell in the *Jonge Margaretha* (1. C. Rob. 189); followed by our own Courts in the *Commercen* (1 Wheat. 382); and since upheld by most writers of these two countries and by a certain number of continental publicists. For a fuller discussion I refer to Professor Hershey's note, in his

recent and valuable work on the International Law of the Russo-Japanese war, p. 161, or Scott's Cases. The regulations governing the British, Japanese and United States navies recognize the doctrine.

But the Russian government at the outset of the war dodged the question by the simple expedient of declaring *all* foodstuffs, *all* fuels, *all* railway material to be contraband "if they are transported on the account of or are destined for the enemy" ignoring the factor of their military use. The continental writers do not, however, support the Russian contention but the contrary, for they incline to hold that these articles, *incipitis usus*, can never be held contraband not that they are always so. Thus whatever one may think of the doctrine of conditional contraband, the *Knight Commander* case illustrates a novel and arbitrary enlargement of the list of contraband and one without precedent, save that attempt of France to make rice contraband in her affair with China in 1885, an attempt which was not put to the test. And Russia herself later in the recent war seems to have held provisions to be conditionally, not absolutely contraband.

5 and 6. Quite apart from the questions above discussed, we now ask whether the destruction of a neutral ship is ever justifiable or is justifiable subject to the payment of compensation. The two questions are not easily separable and are therefore considered together.

To the first question Phillimore and Hall reply, no. Hall declares that the destruction of a neutral ship is a "punishable wrong; if it cannot be brought in for adjudication it can and ought to be released." Sec. 277. Taylor, Sec. 691, says the same. Lawrence, Sec. 215, is of the opinion that neutral owners "have a right to insist that an adjudication upon their claim shall precede any further dealings with it." Snow in his manual for the U. S. Navy, p. 164, is even more explicit. "Neutral property can only be transferred and condemned by proper courts and trial so it is not proper to destroy it. If a neutral vessel cannot be brought into port for adjudication, it should be released." And the latest British writer, Oppenheim (II. p. 470), is to the same effect. "The rule is that a neutral prize must be abandoned in case it cannot, for any reason whatever, be brought to a port of a Prize Court." Various cases adjudicated are to the same purport. I quote a single one. The *Felicity* (2 Dodson 380) in which Sir W. Scott thus expresses himself: "If a neutral ship or protected ship is destroyed by a captor either wantonly or under an alleged necessity in which she herself was not directly

involved, the captor or his government is answerable for the spoliation." He mentions compensation it is true but as a penalty for a wrong not as legalizing the act of destruction. This great Admiralty judge goes on to say "If impossible to bring in, their next duty is to destroy enemy's property. Where doubtful whether enemy's property, and impossible to bring in, no such obligation arises and the safe and proper course is to dismiss. Where it is neutral the act of destruction cannot be justified to the neutral owner by the gravest importance of such an act to the public service of the captor's own state; to the neutral it can only be justified under any such circumstances by a full restitution in value."

Amongst foreign publicists are also found those who fully adopt this rule, that destruction of the neutral ship and cargo are unlawful. Thus Kleen (II. 530): "Or, ce qui est absolument contraire au droit international, c'est de détruire sans jugement régulier des prises neutres." "La destruction d'une propriété neutre n'est jamais une nécessité de la guerre, car le belligérant ne se défend pas par cela contre son ennemi." Both British and and Japanese Admiralty regulations likewise forbid destruction of the neutral.

To the contrary may be cited Art. 50, of the U. S. Naval War Code, which allows destruction in case of controlling reasons, "if there should be no doubt that the vessel was a proper prize," but without applying this rule specifically to neutral ships, and without a trial and condemnation can neutral ships, be *proper prize* without doubt.

"France allows her captors to destroy prizes—apparently neutral as well as enemy prizes—where the destruction is necessary for the safety of the captor or for the success of his operations." (Oppenheim, II. p. 471.)

The Institute of International Law in 1882 adopted a code which regulated maritime capture. Art. 50, reads: "It shall be permitted a captor to sink or burn his prize after taking on board her crew and as much of her cargo as possible and preserving her papers for the judicial inquiry and for the owners' claims;" in five cases of necessity, viz.: the unseaworthiness of the prize; storm; danger of recapture; lack of men; distance from home port. But this again is not in so many words made applicable to neutrals.

In 1887 the Institute enlarged and repeated this code. The same want of explicitness runs through the opinions of continental writers, who are commonly cited on the affirmative of this

question. They allow the destruction of prizes but fail to specify that they mean both neutral and enemy ships. And even so they are lukewarm advocates. Calvo brings their opinions together (V. 277). Thus Bluntschli declares that the captured ship as a rule must be sent before the captor's prize court. One is never authorized to destroy a prize under the pretext that the captor's ports are blockaded. Such a difficulty does not enlarge the rights of the captor. The destruction of the captured ship is only justifiable in case of absolute necessity.

Boeck argues that one may destroy ships as one may destroy property in land warfare, on the basis of military necessity but with the reservation that every prize must be judged.

Perels says that destruction of a prize is only justifiable if said prize could not be sent in without serious risk. After its destruction a judicial decision must confirm the validity of the capture. This if found to be illegal must be indemnified.

His own views Calvo does not clearly give but by way of illustrating them cites the case of two German ships sunk by a French cruiser in 1870. They were enemy ships but with neutral goods on board which also perished. A claim for damages was made against France because, under the Declaration of Paris, such goods in an enemy's ship were exempt. This claim Calvo repudiates, as the French prize court did, on the ground that the destruction of the ships was justified by the necessity of "preserving the safety of the captor's operations," and granting the legality of this act, neutral goods, however exempt from capture, cannot be held exempt from incidental destruction.

In support of the legality of destroying neutral prizes under special conditions, Oppenheim cites Fiore, Geffcken, Martens and Dupuis. It may be doubted, however, if they preserve the distinction between neutral and enemy prizes sharply, and one must remember that the continental publicists have in the main advocated leniency rather than harshness in the rules of prize, opposing the doctrines of the English Admiralty Courts.

It is at least permissible to say that there is no consensus of clear unequivocal opinion amongst continental writers in favor of the Russian contention, but only here and there an expression capable of being so construed, while British opinion is nearly a unit in forbidding destruction under any and all circumstances. One English publicist of authority, however, fails to share in the extreme view. In a paper read before the British Academy in April, 1905, and printed in the "Fortnightly Review" of May, 1905, Professor Holland, discussing the neutral duty of acquies-

cence in belligerent acts, touches upon the *Knight Commander* case and what it illustrates. "If, however, the ship or cargo be neutral, the matter is not so simple. The Neutral Government is not bound to acquiesce in the destruction of the possibly innocent property of its subjects, at any rate unless some overwhelming necessity can be shown for the course which has been adopted; if indeed even overwhelming necessity would be sufficient to justify it. This is of course the question raised by the sinking of the British ship *Knight Commander*, which was effected on July 23rd, 1904, in accordance with the Russian instructions and was approved of by the Vladivostok Prize Court. The attitude of the British Government has been all along adverse to the legitimacy of such a step. Before the occurrence our ambassador had intimated our disapproval of the Russian instructions on the point and he presented a strong protest against the sinking five days after its occurrence. The incident was discussed in both Houses of Parliament (July 28th, August 11th) and was spoken of by ministers as an 'outrage, 'a serious breach of International Law.' I am not sure that this language could be fully supported by a reference to the opinion and practice of nations. While it is, on principle, most undesirable that neutral property should be exposed to destruction without enquiry, cases may occasionally occur in which a belligerent could hardly be expected to permit the escape of such property, though he is unable to send it in for adjudication. The contrary opinion is, I venture to think, largely derived from a reliance upon detached paragraphs in one of Lord Stowell's judgments on the subject, judgments which, taken together, show little more than that in his view no plea of national interest will bar the claim of a neutral owner to be fully compensated for the value of his property, where it has been destroyed without judicial proof of its noxious character. 'Where doubtful whether enemy property and impossible to bring in, the safe and proper course,' says Lord Stowell, 'is to dismiss.' The Admiralty Manual of 1888 accordingly directs commanders who are unable to send in their prizes, to 'release the vessel and cargo without ransom unless there is clear proof that she belongs to the enemy.' This indulgence can hardly, however, be proclaimed as an established rule of International Law, in the face of the fact that the sinking of neutral prizes is under certain circumstances permitted by the Prize Codes, not only of Russia but also of such Powers as France, the United States and Japan (1904.)" This able and interesting exposition of the law as to

the destruction of neutral prizes, is the strongest argument for the Russian view which appeared in England from any one of competence. Yet it will be noticed how guarded and qualified its language is. Moreover, there may be two opinions as to the meaning of Lord Stowell's dictum in the "Felicity." The phrase "no such obligation arises" (see above) which Prof. Holland does not quote, to my mind marks off the status of enemy ships and the reason for their destruction from that of neutral ships and the necessity for compensation in their case if destroyed, in such fashion as to show that the Judge considered such destruction thoroughly illegal. As for the language of the Prize Codes of the United States, Japan and France, to which Prof. Holland appeals, is it not possible that he is misled by their indefiniteness of wording, by their failure to make a clear distinction between enemy and neutral prizes in this matter of destruction? It is at least significant that neither country has resorted to this usage. Moreover, fully considering this very question in the "Discussions" of the Naval War College at Newport, in 1905, our naval officers and their adviser came to the following conclusion: "If a seized neutral vessel cannot for any reason be brought into port for adjudication, it should be dismissed," a conclusion which does them honor.

In the foregoing discussion, the distinction has not been sharply observed between compensation paid for a destroyed neutral ship as implying a penalty for an unlawful act, and compensation interpreted as the price to be paid by the belligerent for destruction as a military necessity acting within his rights. Is there not a real difference between the two, and is not the second identical with the *jus angariae*, a well-known principle in war and recognized by the United States Naval War Code, Art. 6, in these words: "If military necessity should require it, neutral vessels found within the limits of belligerent authority may be seized and destroyed or otherwise utilized for military purposes, but in such cases the owners of neutral vessels must be fully recompensed. The amount of the indemnity should if practicable be agreed on in advance with the owner or master of the vessel. Due regard must be had to treaty stipulations upon these matters."

With this distinction clearly in mind and the *jus angariae* to justify destruction on account of the military necessity alluded to by Prof. Holland, it is contended that the only reason for exceptions to the rule disappears, and that we are justified in laying down as probably the usage of to-day,—with the sole



exception of Russia,—that neutral ships which cannot be taken before a court for trial must be released. If military necessity demands they may be appropriated or destroyed subject to full payment.

In defense of this rule are the following considerations: This is substantially the usage of to-day except in Russia. This is the opinion almost unanimous of British and American writers. Continental publicists while not unanimous, are fairly favorable to this rule. Neutral states demand it as a reasonable measure, in their interest. It is a logical rule because otherwise you are enlarging the penalty of carrying contraband, making ship liable with the goods, and conferring improper judicial authority upon a naval officer not trained for it. If this is not the rule, yet it is a reasonable rule, and as it is the fashion now-a-days to say, the next Hague Conference should make it a rule.

*Theodore S. Woolsey.*

## ATTORNEYS AND COUNSELLORS

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When the lawyers of the American Colonies chose this title for themselves, they pre-empted the entire legal domain of the country with all its rights, privileges, business and emoluments. With full knowledge of the professional distinctions in the mother country, and especially of the separate powers, functions and privileges of the two great classes, Attorneys or Solicitors, and Barristers or Counsellors, they seem to have assumed the title, Attorneys and Counsellors, with genuine American prejudice against British classes in all vocations, and with democratic resolution to abolish such distinctions in their own calling. Succeeding generations of American lawyers, as tenants in common, ignoring English precedents, defying common law rules, refusing division apportionment or specialization, have maintained this titular union, each and every one claiming and having an interest in the whole territory and the right to plant and sow and reap and mow when and where he pleases.

This is both the theory and the condition; and all previous efforts to change either have proven fruitless. Bills offered in legislatures to classify legal practice and divide our profession, as in England, into two great classes, barristers and solicitors, corresponding with counsellors and attorneys, have uniformly been rejected; and generally the courts have declined to take any step toward promoting this classification. We are all admitted to the same bar, take the same oath and in most states have the same right to practice in any of the courts from the beginning; and only a few years waiting is required before obtaining admission to the highest tribunal of the land. *Ab initio* we are all attorneys and all counsellors, whatever that may signify; and that title we hold to the end, and as lawyers can gain no higher. It means everything, and nothing except—lawyers. We vary it slightly sometimes, and call ourselves “Attorneys and Solicitors;” but we mean nothing different by that term than that we are lawyers, and can and will go anywhere or do anything befitting “Attorneys and Counsellors.” Just where or what that may be is not defined, and one cannot surely know, unless he offends the sixth sense of some sensitive body and draws forth from court or from general counsel a warning *Cave!*

All sorts of rhetorical phrases are employed by orators and judges to describe the ideal lawyer, and formulate professional ethics, with the laudable purpose of elevating professional standards and regulating professional conduct, which agreeably excite professional sentiment and receive professional homologation, in the Scottish sense; and yet they prescribe rules and outline conduct as foreign to the American Attorney and Counsellor, as the precepts of the Pharisees or the formulary of the Vestal Virgins.

One expresses regret that the American lawyer does not occupy "that strictly professional relation to the case which the English barrister enjoys;" and another "cannot agree that the practice of law has become a business instead of a profession;" and still another thinks that contingent fees are the Iliad of all our woes, and those who take them degrade the name of lawyer. All this is a beautiful vision, transcendently Utopian. But if we apply such impossible standards to the "Attorneys and Counsellors" what will become of the American lawyers?

This great army of American lawyers—more than 100,000 all Attorneys and Counsellors—are bound by the common tie of their oath of office to support the Federal Constitution, and the constitutions of their respective states; and also "truly and honestly to demean themselves in the practice of law according to the best of their knowledge, skill and ability."

The words may vary in the various states;<sup>1</sup> but the substance of the obligation taken is the same *ubique, semper et ab omnibus*.

The gist of the oath is *fidelity*, the indispensable and crowning virtue of the lawyer; he must be faithful to his client, to the court and to honor; this is the sum total of official duty—the Alpha and Omega of obligation. For breach of it in any part he is amenable to summary discipline by the courts, even to disbarment; and besides he is liable to prosecution or action, common law or statutory, for wrongs criminal or civil, to the state or any person natural or legal.

Most states have statutes against barratry; some against

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1. In Pennsylvania: "To behave himself in the office of Attorney according to the best of his learning and ability, and with all good fidelity to the Court or to the client. to use no falsehood nor delay any man's cause for lucre or malice."

In Tennessee: "Truly and honestly to demean himself in the practice of his profession to the best of his skill and abilities."

In England: "Truly and honestly demean himself in the practice of an Attorney according to the best of his knowledge and ability."

maintenance and champerty; and some against contracting for division of fees with persons not lawyers. Such statutes give lawful expression to the public policy of the state in regard to the conduct of lawyers, and, as law, demand the respectful obedience of all Attorneys and Counsellors.

But what shall we say of the practice and behavior of lawyers in those states which have no such statutes and policy? Is there any duty, legal or ethical, requiring obedience to the laws of other states, or conformity to the practice in other countries or to the rules and traditions of the English Inns of Court? Is the American Attorney and Counsellor at Law to be henceforth an English barrister shorn of contractual power and right to sue for his fees, a purely professional gentleman without faculty or privilege to transact legal business for his client or himself?

Such questions are not inopportune under present conditions and influences, and they are of vital importance to the general practitioners.

All agree that they are fairly honest and honorable, these Attorneys and Counsellors; and many believe that, take them as a whole throughout the entire country, these unbonded trustees of the business world, these repositories of the business and domestic secrets of all people, are not excelled by any class or vocation in probity, integrity, and uprightness. What proportion of these, do the professional puritans suppose, could truthfully say—during the past twelvemonth I have not received a contingent fee? One half? No. One fourth? No. Possibly one tenth if we count all those who are retained by salary to give their entire time and talent to the defense of corporations and these are unanimous in condemnation of contingent fees.

What proportion of American lawyers could say: I have been strictly professional during the past year, have kept myself clear of business? Even a smaller proportion than those who take no contingent fees—for, here the general counsel and their followers could not be counted.

It is notorious that the vast collection business of America, small and great, is all conducted by lawyers for contingent fees; we pay ourselves out of the sums collected; no collection, no fee.

And is not this *business* too! What shall we call the skilful piloting of the vast fleets of corporation craft over the shoals of law and finance but *business*? What other than "*business*" shall we call the soliciting of patent-rights and the searching and passing upon legal titles? None of these things pertain to the functions of the English barrister, whose fees are earned by the

conduct of cases in court; who confines himself almost exclusively to the duties of advocacy. His field is grand, but not varied; his function lofty and purely professional. Often he does not know his client—never sees him. He takes no fee from him, transacts no business for him, does not even prepare his case for trial. All this has been done by the solicitor, even to the pleadings before the barrister is called into the case, which often happens within a week or even a day before the trial, when the solicitor hands him simultaneously his fee and his brief, showing him the matter of contention and the witnesses to prove his case, with full account of the peculiarities and antecedents of each, to which is added oral elaboration.

A few counterparts of the English barrister, professional paragons, there may be at the American bar, possibly one in a hundred, not more. What shall we say, then, of the ninety and nine attorneys and counsellors who transact business, or take contingent fees—are they unworthy? In every city and county of the United States they may be found, the trusted confidants of the millions, handling their moneys without bond, buying and selling their land, administering their trusts, drawing their deeds and wills, counselling parents, and husbands and wives, closeting domestic skeletons, managing business, directing affairs, controlling corporations and conducting lawsuits, doing all uprightly, honorably, conscientiously; and yet they are transacting business, and taking contingent fees not only on collections but in actions for injuries to person, property and reputation—fees not unlawful nor unworthy, but earned by diligent, skilful, faithful service in open field and honorable contest.

Why contrast the American attorney and counsellor with the English barrister only, when a vast majority of English lawyers are not barristers, but solicitors conducting the affairs of their clients as do American lawyers in an honorable, lawful way, and deserving all praise for it and receiving their reward?

Why say that the vocation of the American lawyer is "not a business, but only a profession," in these teeming times, when three-fourths of the business of the country is transacted by corporations, creatures of the law, endowed, empowered and regulated by law, and of necessity guided by the hands of lawyers, most of whom rarely appear in court?

And why censure the majority of American attorneys and counsellors for taking fees, permitted by law, fairly and honestly earned and not derogatory to professional obligation or character?

This censure has never been directed against the commercial lawyers for charging commissions on their collections. And yet what is that but taking contingent fees? Is this exemption from blame awarded because they represent the creditor class or because the actions which they bring are *ex contractu*? Their functions surely belong to "business" rather than "profession;" and surely there is no logic or law for censuring one class of lawyers for plaintiff, those who bring actions to obtain compensation for breaches of social and legal duty, and passing without query, even, the class who sue for breaches of contract. The clients of the former are human beings, deserving well of the profession and of society, and as much in need of faithful, diligent, skilful service, as the the merchant, or broker, or short loan man, who has the chattel mortgage on the last piece of household and kitchen furniture, to secure his discounts. Why the distinction and the adverse classification?

This new ethical movement for the regulation of attorneys and counsellors, if not originated by the great insurance, railway, mining and manufacturing corporations, seems to have their undivided support. The presidents, directors and general counsel greatly admire those noble professional institutions of London, the Inns of Court, and unanimously appreciate and approve their stringent rules and venerable authority. They are true exponents of the common law, existing "time whereof the memory of man runneth not to the contrary," and their customs and usages speak to them with the authority of the ages. Their members not only may not take contingent fees—they may not invoke the aid of the courts to collect the fees they have earned, whether upon express or implied contracts; nor may they soil their hands with any of the details or drudgery of preparation of cases. They are "called to the bar," set apart and consecrated to the higher labors of the profession and may not pursue business methods; a legal aristocracy; professional earls; whose wives and daughters at all social functions may enjoy the sweet sense of precedence over their envious sisters, the wives and daughters of mere solicitors, and thereby may "maintain the establishment;" gentlemen of independent fortune rarely relying upon their fees for their support.

This justly distinguished body of gentlemen, the English bar, professional sacrosancts of a foreign land, are held up for imitation to the American attorneys and counsellors, and our decadence deeply deplored in the hall of the general counsel. We are actually doing the work of solicitors and attorneys, the

business of the profession. Just as in England, our clerks "introduce" clients—as also do other attorneys and solicitors—and may stipulate for part of the fees. Like the English solicitors, we may make advances for our clients and pay the expenses of his action; or, since lawing may be done on credit in America, we may become his surety for costs, to the end that he may obtain legal justice in the courts; and some, even, have shocked the delicate sense of honor of the General Counsel by receiving conditional fees from the victims of negligence, or fraud, or their helpless widows in the unequal contest for compensation which they must need wage with their powerful and conscienceless adversaries.

And how powerful and united these great corporate influences are,—witness the general distribution of annual railroad passes, for the past two decades, to the occupants of the bench, and, on occasions, the provision of the special car, well stocked and manned for a trip to Maine or Florida, to Minnesota or California; and recall the charming candor of President Milton Smith's explanation—that the railroad lawyers preferred to appear before judges thus equipped and obligated.

Witness, too, that when the mayor of a great city was grappling in legal contest with a great *quasi* public corporation for the protection of the municipality and its citizens against pecuniary rapine and plunder he could not find for counsellor among his fellow-citizens a single lawyer, worthy, able and willing to perform so noble a civil duty, lest, forsooth, he might transgress the rules of corporate courtesy, and offend his client, though it had no legal interest in the cause. And if a great and greatly plundered city cannot, either for money or civic loyalty, gain a lawyer to serve its righteous cause, what chance has one of the four thousand annual victims of railroad carelessness, or the ten thousand of mining or manufacturing negligence, to get the services of competent counsel unless he, or (generally) she, can offer some inducement to a lawyer equipped for such a Herculean task?

Well does the lawyer know the "influences" he must encounter in his long struggle, in which demurrers, continuances, rules for additional security, mistrials, caused by "ringers" in the jury-box, new trials granted *ex gratia* or otherwise, and, more dangerous than all during this "law's delay" and the hunger and want following the death of the "bread-winner," the secret and constant plying of his client by skilled agents and hired kinsmen or friends with the offer of "something sure" instead of the

uncertainty of a verdict already so long deferred as to make the heart sick—and shall he wage this unequal contest for years maybe, without promise of reward for his fidelity, fortitude and constancy?

But for these virtues, and more, in her faithful, generous attorneys and counsellors, what hope for compensation for the unlawful killing of her husband could the widow Schlemmer have had for correcting the instructed non-suit of the State judges, who refused her the practical benefit of section 8 of the railway regulation act, and pronounced her husband guilty of contributory negligence in raising his head a few inches too high while making a murderous coupling of cars not lawfully equipped with an automatic coupler?<sup>2</sup> How could she, in her widowhood and want, have undergone the expense of the writ of error to a State Supreme Court to get legal justice in the Federal Supreme Court, unless some good kind friend, like her counsel, had advanced the money and skill for her benefit?

And yet, say the corporation moralists, you must not stipulate for a contingent fee, although it would be proper to await the result and then take or accept proper compensation! Indeed! Sit as judge in your own case, or "have a scrap" with your client over your fee at the end, when agreement beforehand might have avoided both horns of the ugly dilemma! Is there any good reason for leaving the solid ground of common sense and flying into the empyrean for solution of this practical problem of ethics?

The courts of civilization are substitutes for the bludgeon and torch of barbarism, and those suffering legal wrongs are invited to come to them for redress. Widows and orphans of killed employees must have lawyers to enable them to accept the invitation. The American attorney and counsellor is rarely a gentleman of fortune who can afford to carry on such litigation without fee or reward or the hope or promise thereof. If the statutes of champerty and maintenance forbid contingent fees and material assistance, he obeys them, and does the best he can for himself and client, and if successful, in some way gets *quantum meruit* at the end. But if the laws do not forbid it, and both himself and client prefer to this uncertainty a definite arrangement, a fixed *per centum* of the recovery, what principle of ethics can forbid the agreement, or deny to himself and client

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2. *Schlemmer v. Railway Co.*, U. S. Sup. Ct. Advance Sheets, 15 April, 1907, p. 407.



*in limine* the right of contract enjoyed by all other citizens, subject to the same legal and equitable rules?

Some object to the lawyer's interest in the result! But we are taught by the doctors of the law that devotion to the client's interest is a lawyer's duty and a virtue. And can it be harmful that his *quantum* of interest is certain rather than uncertain? In nine cases out of ten, the lawyer has no recourse or hope for compensation except out of the recovery. Others affect to believe that such services to such parties should be rendered gratis! That is surely a chivalric view of the subject, and may control many; but most lawyers are in practice, as other men in other occupations, not for health nor for glory, but to earn an honest living for themselves and their families and to lay aside something for the rainy days.

In fine, the American attorney and counsellor lives in all the stress and storm of the strenuous life, at the very storm center of it. He is of flesh and blood like other men and must strive and cry for his good living. He must keep the law, of course, in its letter and its spirit, and must teach others so to do. But when he is so doing he has the same right of contract and of legal protection as other men. And the words of censure and depreciation uttered against him for claiming and exercising his right,—when not the fruit of cant and hypocrisy or the product of sordid interest and gain,—are readily referable to a sublimated spirit of ethereal ethics, ill fitting the practical business life of the American attorney and counsellor of the twentieth century.

*Henry H. Ingersoll.*

# YALE LAW JOURNAL

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## INTERFERENCE WITH CONTRACT ENJOINED.

The recent case of *Beekman v. Marsters*, reported 80 N. E. 817, and decided by the Supreme Court of Massachusetts, upheld an injunction granted to restrain the defendant from acting under a contract which he had obtained by inducing the breach of a contract between a third party and the plaintiff. A hotel company had made the plaintiff an exclusive agent for it in a certain section, and the defendant afterwards induced the hotel company to appoint him an agent also. The plaintiff, on showing unlawful interference with his contract by the defendant and that damages would not afford him an adequate remedy, was entitled to an injunction.

That inducing the breach of a contract is actionable seems to be a sound principle. A person entering into a contract with another, has, flowing from that contract, legal rights. Is it lawful for another to interfere with those legal rights? Undoubtedly many judges have thought and held that inducing a breach of contract by means of persuasion was not actionable, and most cases holding such acts unlawful have strong dissenting opinions. *Vegeahn v. Gunter*, 167 Mass., 192.

But conceding the right to sue a person wrongfully inducing the breach of a contract, it would seem that, some special ground for equitable jurisdiction existing, an injunction ought to issue to protect the legal right. Such ground for equitable jurisdiction might be irreparable injury, as in acts of trespass, or the fact that the remedy at law for damages was inadequate. *Pickett v. Walsh*, 192 Mass., 572.

The case of *Pacific Postal Tel. Cable Co. v. Western Union Tel. Co.*, 50 Fed. 493 is worthy of notice in this connection. The plaintiff company was granted an exclusive right of way along a railroad to conduct a telegraph system. The defendant corporation prepared to put in a telegraph line to compete with the plaintiff and an injunction was sought against the former. Here there was no allegation of the defendants inducing the breach of the plaintiff's contract, but knowing of the existence thereof, and attempting to build a rival line, certainly amounted to a violation of plaintiff's contract. It is true in this case, that an injunction was denied, but this is easily to be accounted for on grounds other than those of a denial of the right. When a person seeks equitable relief there are many influences of an equitable nature which affect the chancellor. In this case, the plaintiff's contract was held not only *ultra vires* but also against public policy. Such a case can hardly be an authority denying the right as recognized in the principal case.

On the other hand, in the case of *Western Union Telegraph Co. v. Rogers and the Baltimore and Ohio Telegraph Co.*, 42 N. J. E. 311, the right to an injunction under circumstances similar to those in the principal case is recognized and with reasoning clear and convincing. Rogers owned a hotel and gave the complainant an exclusive privilege to operate a telegraph office. Rogers afterwards entered into a contract with the Baltimore and Ohio Telegraph Co. extending to them a like privilege. The complainant sought to enjoin the latter from exercising this privilege. The defense was "adequate remedy at law." The court said the position that this court of equity ought to allow parties to violate their agreements and send the injured party to law was not tenable. As further supporting the granting of the injunction, the vice-chancellor said that adequate damages could not be obtained at law. There was no way of estimating damages at law, as the value of one office only depended on the number of connections that office had. "Irreparable injury simply means a grievous injury, not adequately reparable by damages at law. By inadequacy of the remedy at law is meant that the damages obtainable at law are not such a compensation as will in effect, though not in specie, place the parties in the position in which they formerly stood." *Kerr on Injunctions* 200. "The mere circumstances of the breach of contract may afford sufficient ground for the court to interfere by injunction." 1 *Joyce on Inj.* 75.

It is everywhere conceded that the remedy by injunction is being extended. Equity takes cognizance of many actions now that formerly could not have arisen. It may perhaps be doubted

if in the earliest days of chancery jurisdiction, the chancellor would have thought it possible to enjoin the defendant in the main case. But the advantage of this remedy is certainly a sufficient reason for its application in *Beekman v. Marsters*.

#### LEVY ON PROPERTY IN DEBTOR'S HANDS.

The recently decided case of *Richards v. Heger*, 99 S. W. 802, holds that an officer acting under and by virtue of a writ of execution does not commit a trespass in seizing money in the hands of the execution debtor while he is engaged in counting it. The action is one brought by the latter to recover the money. It seems plaintiff had the sum of \$450.00 due from an insurance company. Payment of such was made in the company's office by tossing to him a package of bills with the statement that it was his and to count it. Proceeding to do so, the defendant, a constable, came up behind him, grabbed the money out of his hands, said, "I levy on this," and then read the writ under which he acted. The court in passing opinion relied most strongly on the case of *Green v. Palmer*, 15 Cal. 411 and *State v. Dillard*, 3 Iredell's Law (N. C.) 102; and these, together with an extract from *Freeman on Executions*, constitute the only authorities cited in support of the conclusion reached. The argument of the court is embraced in the following: "The seizure of property attached to the person of a defendant would be a trespass against his person as it would tend to provoke a breach of the peace, but to seize his property found in his possession, not pertaining to his wearing apparel, nor worn or carried on his person for use or as an ornament, would not be an indignity against his person nor, under ordinary circumstances, a trespass. The circumstances of the seizure in question were no more likely to provoke a breach of the peace, and possess no more of the elements of a trespass, than an entry by the officer on the premises of the defendant in the execution and the seizure there, in his presence, of his personal effects against his will and over his protest. Either act would be a trespass but for the acts and powers with which the officer is clothed by law for the purpose of writs of execution. He commits a trespass when he seizes and levies upon the defendant's property exempt from execution, or when to make a levy he commits unlawful violence against his person; but to take a bridle rein, by which defendant is leading his horse, from his hand, or a bag of gold, or a package of currency he is holding in his hand, is not committing violence against his person, and in our opinion is not a trespass." This is all the court has to say on the subject, substantially a mere declaration of the conclusion. It is to be regretted that more consideration was not given to a legal analysis of the situation as the precedence upon which it relies appear indefensible on the basis of theory or policy. *State v. Dillard* was the seizure under execution of a horse on which the owner was riding. It was held legal. But a horse does not partake so much of the nature of property which is on the person as money and articles of clothing or adornment. The relation between it and its owner

is not so intimate nor would there be such a feeling of natural sanctity relative to it. This decision is not nearly the extreme case as the present and can hardly be said to be an authority for it. The quotation from *Freeman on Executions* is to the effect that the California case of *Green v. Palmer* (supra) "seems to establish the proposition that money in the hands of the debtor may be seized under execution" but then goes on to doubt the logic of such a rule. So the real and only foundation for the present decision is the case of *Green v. Palmer*. There are no equivocal circumstances or phraseology connected with this case. It holds that the seizure under execution of a bag of gold in the hands of the debtor is justifiable. However, the decision is unusual and the courts of sister states should feel much hesitancy in following it unless, by sound reasoning, it can be vindicated.

At one time the idea obtained in England that money was not subject to execution, and the quaint even if fallacious reason given was that nothing was so subject except it could be sold and the inherent nature of money negated that notion. Lord Mansfield in *Armistead v. Philpot*, Doug. 231. But it is superfluous to say that the rule is no longer adhered to either there or in this country. Marshall, C. J. in *Turner v. Fendall*, 1 Cranch 117. In this connection Lord Coke said, speaking of what was the subject of distress, "Although it may be of valuable property, as a horse, etc., yet when a man or a woman is riding on him, or an axe in a man's hand cutting off wood or the like, they are for that time privileged, and cannot be distrained." *Co. Lit.* 47, a. But there is a distinction between distress and levy under execution inasmuch as the former is the act of the party himself and the latter that of an officer of the law. The reasons assigned, if not of equal potency in the two cases, nevertheless have strong bearing on the question we are at present considering.

The rule of universal prevalence is that property on the person is exempt from levy. In *Holmes v. Nuncomb*, 12 Johns. (N. Y.) 395, the constable was present when money was paid to a person against whom he held a writ of execution. The latter handed it to the officer asking him whether in his opinion it was counterfeit, and it was immediately levied on by him. This was held to be a valid levy. In another case a levy was made by an officer on a watch which has been handed to him for purposes of comparison with his own. A small cord encircling the owner's neck had to be broken in separating it from him. This was held to be a trespass. *Mack v. Parks*, 8 Gray 517. A later Massachusetts case holds that a valuable breast pin, though worn with the avowed object of precluding its being seized under legal process, could not be so taken while on the owner's person. *Maxham v. Day*, 16 Gray 213. In a Tennessee case, it was held that a levy on blacksmith's tools while in use by him was invalid, there being no statute on the subject. The case is very meagerly reported in *I. Yerger* 397.

The basic reason underlying all these decisions is that the seizure of property on the person is so provocative of resistance

by the owner that the policy of the law forbids it. Why does that not apply to the seizure of money in the hands? That is undeniably as invitory of a personal encounter as the seizure of a breast pin worn on a scart. The opinion in *State v. Dilliard*, holding that a horse being ridden by its owner could be levied upon, assigns as a reason that it is the duty of the person to surrender his property to legal process as much in the case of where he is using it as where it is merely in his sight or presence. No distinction can be drawn on the duty theory. Is it not as much the duty of the party to surrender a valuable breast pin worn by him as it is to surrender his horse which perchance is to him a means of livelihood? Is it not as much the duty of a person to surrender money in his pocket as it is money in his hand? Yet it can be indisputably asserted that no court would sustain a levy on the former. It is on his person in one case as much as in the other, and in both the incentive to personal conflict concerning which the law is so solicitous, is present in a high degree. The propriety of the rule laid down in the California and Missouri cases can well be doubted.

#### CONFLICT OF LAWS. MARRIAGE CONTRACT.

The Supreme Court of the United States rendered a decision April 15th, in *Travers v. Reinkhardt*, which is interesting as a modern construction of common law marriage. The case was tried on an appeal from the Court of Appeals of the District of Columbia, 25 App. D. C. 567. The litigation arose in construing a will, and the validity of the marriage of James Travers became material in determining whether his wife would take under a provision of the will. In the opinion, the following facts were in substance conceded to be established. In 1865 a marriage between James Travers and Sophia V. Grayson was performed in Alexandria, Va., by a friend of Travers who in fact was not a person authorized by statute to perform such a ceremony. The woman believed it was a real marriage. After this ceremony the woman assumed the name of Mrs. Travers. They thereafter lived in Maryland till 1883 as husband and wife. A few months prior to Travers' death they had resided in New Jersey. During all the eighteen years of their cohabitation they had continued the relation of husband and wife in every way, and were so considered and respected in the communities in which they lived. Abundant evidences such as deeds, an unattested will and the last will of Travers showed that they considered themselves as husband and wife. The situation was briefly this: Following the Virginia Supreme Court of Appeals construction of the Virginia statute, the marriage in Virginia was void. The statute, requiring every marriage to be under license and solemnized in manner prescribed, was considered mandatory and not directory and it thus abrogated the common law. Cohabitation for over fifteen years in Maryland did not establish a legal relation of husband and wife, for the Maryland Court of Appeals had held that in that state there can-

not be a valid marriage without a religious ceremony. The short residence in New Jersey prior to Traver's death was the means of giving their cohabitation recognition as a legal relation of marriage. New Jersey recognizes the common law principle of marriage, and from the continued cohabitation of this couple an agreement *per verba de praesenti* was implied, and the court held the marriage valid in law, so the wife was entitled to take under the provisions of the will in controversy.

The general rule that marriage is valid or void by the law of the place where it is celebrated is valid or void everywhere, is very familiar. It has been held in New Jersey that when a man and a woman intend to marry and live together as husband and wife but their intent is frustrated by the existence of some unknown impediment, when the impediment is removed and it is shown that the same intent continues, their relations are lawful. *Chamberlain v. Chamberlain*, 62 Atl. 680. Most states by statute prescribe the formalities which are required to constitute a valid marriage in their respective territories. In construing these statutes the courts consider that marriage is a right which existed before statute and that the relation was encouraged at common law. So where statutes give requirements unless the statutes also expressly deny validity to marriage not in conformity thereto, such a statute will be construed as directory and not mandatory. *Maryland v. Baldwin*, 112 U. S. 490. *Heyman v. Heyman*, 218 Ill. 636. *Bishop on Mar. & Div.* Sec. 283. Speaking of statutes, the court, in *Meister v. Moore*, 96 U. S. 76, says: "In many states, enactments exist very similar to the Michigan statute, but their object has manifestly been not to declare what shall be requisite to the validity of the marriage but to provide a legitimate mode of solemnizing it." The state alone has the right to regulate marriage within its boundaries.

*Travers v. Reinhardt* presents a novel situation made possible by the diversity of marriage requirements in the different states. The lack of uniformity in our marriage laws has for a long time been a source of confusion and continues a problem for legislation yet unsolved.

## RECENT CASES

**LANDLORD AND TENANT—NOTICE TO QUIT—WAIVER BY LANDLORD.—**ARCADE INV. CO. v. GURIET, 109 N. W. 250 (MINN.).—*Held*: A notice to quit, given by the landlord to a tenant, may be waived by the landlord. Henceforth the notice is inoperative. It is an established rule that a notice to quit may be waived by the reception of rent after notice has been given. *Stedman v. McIntosh*, 27 N. C. 571. But mere demand of rent does not constitute a waiver, *Condon v. Barr*, 47 N. J. Law 113, nor receiving back rent due prior to notice. *Norris v. Morrill*, 43 N. H. 213. So a landlord giving a second notice after the expiration of first one, waives right of proceeding on first notice. *Morgan v. Powers*, 31 N. Y. Supp. 954. Likewise a notice to a tenant by a landlord, touching the termination of the tenancy, the same recognizing the existence of a lease, amounts to a waiver of former notice. *Dockwill v. Schenk*, 37 Ill. (App.) 44. Conversely, a tenant giving landlord notice that he intends to quit and then holds over, the tenancy is regarded as continuing, *Graham v. Dempsey*, 169 Pa. 460; notwithstanding some accidental cause keeps the tenant over. *Mason v. Wiereng*, 113 Mich. 151. In New York, however, a contrary doctrine is held. *Herter v. Muller*, 159 N. Y. 28, in which case three judges dissented.

**MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE APPLIANCES.—**KENTUCKY AND INDIANA BRIDGE AND R. CO. v. MORAN, 80 N. E. (IND.) 536.—*Held*, It is the duty of the master to exercise ordinary care to furnish or provide machinery and appliances reasonably safe and suitable for his employees, and to exercise a reasonable supervision in keeping them in a reasonably safe condition for use. It is the duty of the master to use such care in providing safe and proper machinery and appliances, and in keeping the same in repair, as prudent and careful men, similarly engaged, exercise. *Gorns v. Chicago R. I. & P. R. Co.*, 37 Mo. App. 221. A master is bound to use all reasonable care, diligence, and caution in providing for the safety of those in his employ, in furnishing them with safe, sound, and suitable appliances, and in keeping the same, *Haugh v. Rissner*, 4 N. Y. St. Rep. 664; *Frank & Otis*, 15 N. Y. St. Rep. 681. It is the duty of a master to use reasonable and ordinary care and foresight in procuring appliances to be used by his servants. *Dedrick v. Missouri Pac. Ry. Co.*, 21 Mo. App. 433.

**MASTER AND SERVANT—INJURIES TO SERVANT.—DEFECTIVE APPLIANCES.—**KNOWLEDGE OF DEFECT.—ALVES v. NEW YORK, N. H. & H. R. CO., 65 ATL. 261. (R. I.).—*Held*, an employee cannot recover from a railroad company for injuries caused by the breaking of a handle of a hand car by reason of defects in that portion of the handle which is fastened in the iron socket, and which cannot be discovered without removing it from the socket, in the absence of proof of the actual knowledge of the defect. *Wood on the Law of Master and Servant*, Section 322, says in substance that a servant in order to recover damages for injuries must prove negligence on the part of his master and due care on his own part, besides having two presumptions to rebut, (1) That the master has discharged his duty and (2) That he had no knowledge of the defect. The cases in point certainly seem to sustain this statement. Two



cases hold that an employer cannot be charged with negligence unless he knew of the defect. *Simpson v. Pittsburg Locomotive Works*, 139 Pa. 245; *Drwig v. New York, O. & W. R. Co.*, 26 N. Y. Supp. 405. The court in the case of *Bogenschuis v. Smith*, 84 Ky. 330, held that the plaintiff in order to recover damages must show, among other things, a knowledge of the master that a defect existed. When a defect is unknown to both it has also been held that the servant cannot recover. *The Mad River and Lake Erie R. R. Co. v. Barber*, 5 Ohio S. R. 541.

MASTER AND SERVANT—JOINT LIABILITY—TRADE UNIONS.—*WYEMAN v. DEADY, ET AL.*, 65 ATL. 129 (CONN.).—*Held*, a labor union and its walking delegate, who procured plaintiff's discharge from employment, by means of threats made to plaintiff's employers, with the knowledge, approval, and authority of the union, were liable for plaintiff's discharge as joint tortfeasors.

"Interference by fraud or force with the free exercise of another's trade or occupation or means of livelihood is a tort. . . . Where a violent or malicious act is done to a man's occupation, profession, or means of obtaining a livelihood, then an action lies in all cases." *Addison on Torts*, 9-14. In accord with this doctrine it has been decided that an actor had a right of action against people who by jeering at him forced his employer to discharge him. *Gregory v. Brunswick*, 6 Man. & Ge. 205. It seems to prevail that anyone causing a contract to be broken between two parties to the injury of one of them is liable thereto. *Chipley v. Atkinson*, 23 Fla. 206. In the case of *Bowen v. Hall*, L. R. 6 Q. B. D. 338, it was held that, while it might not be unlawful to persuade one to break a contract, it would certainly be an actionable case if persuasion is used maliciously to the injury of the plaintiff or benefiting the defendant at the plaintiff's expense.

MECHANICS' LIENS—CREATION OF LIEN—STATUTES.—*VOLKER-SCOWCROFT LUMBER CO. v. VANCE*, 88 PAC. REP. (UTAH) 896.—*Held*: That in the absence of an express contract creating a lien, the lien which a material man becomes entitled to depends solely on the statute for its existence, for his lien is a preference which he may secure by proceeding in a particular way and complying with the statutory requirements on the subject, and not otherwise.

Mechanics' Lien Acts are an innovation upon common law, which gave no such lien, *Belanger v. Hersey*, 90 Ill. 70; *Associates of the Jersey Co. v. Davison*, 29 N. J. L. 415; equity also raises no lien in relation to real estate except that of a vendor for purchase money, *Ellison v. Jackson Water Co.*, 12 Cal. 542; therefore, being remedial, *White Lake Lumber Co. v. Russell*, 22 Neb. 126; they must be strictly construed, 1 *Bl. Comm.* 87; *Logan & Cook v. Attix*, 7 Iowa 77; and claimant must comply with all the requirements of the statute, not only in creating the lien, but also in its continuance and enforcement. *Wagner v. Briscoe*, 38 Mich. 587; *Mushitt v. Silverman*, 50 N. Y. 360. There are cases in regard to the last point resulting in two different views, first, that the privileges under these statutes are *stricti juris*, and party claiming under them must point to express law which gives him such right of preference, *Laudry v. Blanchard*, 16 La. Ann. 173; *Willard v. Magoon*, 30 Mich. 273; second, that the acts are not to be construed *strictissimi juris* but so as to secure substantial justice, *Putnam v. Ross*, 46 Mo. 337; the substantial requirement must, however, have been in good faith. *White v. Claffin*, 32 Ark. 59.

**MONOPOLIES—CONTRACT—RESTRAINT OF TRADE.**—**CONTINENTAL WALL PAPER CO. v. LEWIS VOIGHT SONS CO.**, 148 Fed. 939.—*Held*, that where a combination of manufacturers and wholesalers of wall paper was claimed to be in restraint of trade and in violation of the congressional anti-trust act of 1890 (Act July 2, 1890, c. 647, 26 Stat. 209), it was immaterial to the validity of the combination that the agreement was valid at common law as imposing only a reasonable restraint on competition, provided the direct result of its operation was to directly restrain freedom of commerce between the states or with foreign nations.

Under this act any combination that imposes restraint is unlawful, whether legal or illegal at common law, *United States v. Freight Ass'n*, 166 U. S. 290, and it is immaterial whether the restraint is fair and reasonable or whether it actually results in raising the price of the commodity dealt in. *United States v. Coal Dealers Ass'n*, 85 Fed. 252; *United States v. Ass'n*, 171 U. S. 505.

**NEGLIGENCE—CARE AS TO LICENSEE.**—**ROSENTHAL v. UNITED DRESSED BEEF CO.**, 101 N. Y. SUPP. 532.—*Held*, that where there was a means of access to a slaughter house through the defendant's premises, a customer of the owner of the slaughter house passing through defendant's premises to reach the same was a mere licensee to whom defendant owed no duty of active care.

It is only where a party comes on the premises of another by invitation either express or implied, that the owner assumes the obligation of providing a safe and suitable means of ingress and egress and of moving about the premises. *The South Bend Iron Works v. Larger*, 11 Ind. App. 367; *Rear-don v. Thompson*, 149 Mass. 267. A person, whose only right to use certain premises consists of the fact that the owner does not object to such use, is a mere licensee, *McCorn v. Thilemann*, 36 N. Y. Misc. Rep. 145, and one who enjoys such permission is only relieved of being a trespasser, *Vanderbeck, Vanderbeck and Pierson v. Hendry*, 34 N. J. Law 467, and must assume all ordinary risk attached to the nature of the place or the business carried on. *Faris v. Hoberg, et al.*, 134 Ind 269.

**OFFICERS—COMPENSATION.**—**STEPHENS v. CITY OF OLDTOWN**, 65 ATL. 115 (ME.).—*Held*, that a public officer for the performance of his official duties is entitled to such compensation only as is fixed by law for that office. If no compensation has been thus fixed, he is not entitled to any.

*Williams v. Chariton County*, 85 Mo. 645, held that no fees are allowed an officer, except where expressly given and allowed by law. This doctrine was upheld even more strongly in the case, *Hatch v. Maine*, 15 Wend. (N. Y.) 45, which held, not only that a public officer cannot recover for extra compensation for the rendition of his duties, but that such an agreement if made would be against public policy. In an Alabama case it was held that a person who accepted an office took an office *cum onere* and if no compensation was fixed for the rendition of duties of that office they were presumed to be gratuitous. *State ex rel. Pollard, Jr., v. Brewer*, 59 Ala. 130. The same principle is found in *Carroll County Commissioners v. Gresham*, 101 Ind. 53. In the old Connecticut case of *Preston v. Bacon*, 4 Conn. 471, it was held that an officer could not recover on a note given to him for compensation for services rendered by him which he was legally bound to carry out. Such an agreement being contrary to public policy.

PRINCIPAL AND AGENT—MUTUAL RIGHTS—ACTING FOR ADVERSE PARTIES.—COMPENSATION.—*ATTERBURY V. HOPKINS ET AL.*, 99 S. W. (Mo.) 11.—*Held*, If an agent employed by one party acts secretly for the other also, he cannot recover compensation from his employer, who was not aware of the dual agency. An agent cannot obtain a commission from his principal for buying, where, unknown to such principal, he has received a commission from the seller. *Finsley v. Penniman*, 12 Tex. Civ. App. 591. An agent, who, in procuring subscriptions to the stock of a corporation fraudulently and without the knowledge of the company, received rewards from subscribers for procuring their lands to be taken by company, cannot recover compensation from the company. *Cleveland & St. L. R. Co. v. Patterson*, 15 Ind. 70. An agent cannot recover compensation for his services where he acted for both parties without the knowledge of the party who employed him. *Huffcut on Agency*, p. 102.

PRINCIPAL AND AGENT—NOTICE TO PRINCIPAL—KNOWLEDGE OF AGENT.—*BADGER V. COOK*, 101 N. Y. SUPP. 1067.—*Held*: That the burden is on a party seeking to charge a principal with knowledge of his agent acquired in a different transaction and before the agency existed to show by clear and satisfactory evidence that the knowledge was present in the agent's mind at the time of the transaction under the agency.

The general rule is that notice of facts to an agent is constructive notice thereof to the principal when it is connected with the subject-matter of the agency. *Swit v. Woodhall*, 113 Mass. 391. Likewise if acquired pending the proceedings. *Johnston v. Laffin*, 103 U. S. 800. The old English rule was that notice of facts to the agent to bind the principal by constructive notice should be in the same transaction. *Warrick v. Warrick*, 3 Atk. 291. This was later modified to the extent that when one transaction is closely followed by and connected with another, it is constructive notice to the principal, *Hargreaves v. Rothwell*, 1 Keen 154. But it is also held that agent must actually have it in mind at time of the second transaction. *Nixon v. Hamilton*, 2 Dru. & W. 364. *The Distilled Spirits*, 78 U. S. (11 Wall.) 356. This rule holds good when knowledge is obtained when acting outside of his employment. *Wilson v. Minn. Farmers' Mut. F. Ins. Asso.*, 36 Minn., 112; also extends to corporations and their officers. *New Milford First Nat. Bank v. New Milford*, 36 Conn. 93. Except when agent is engaged in committing an independent fraudulent act on his own account. *Allen v. South Boston R. Co.*, 150 Mass. 206. Burden of proof is upon the party who seeks to charge the principal with notice by reason of such knowledge of agent. *Constant v. University of Rochester*, 111 N. Y. 604.

SALES—ARTICLES TO BE MANUFACTURED—CONTRACT—BREACH—WAIVER.—*ROBERT GAIR CO. V. LYON, ET AL.*, 101 NEW YORK SUPP. 787. A manufacturer received an order from a dealer for the manufacture of cartons to contain a specified address and to be delivered in installments. The manufacturer delivered an installment which did not contain the address, but which the dealer accepted and paid for. The manufacturer delivered a second installment, which the dealer refused to accept on the ground that the cartons did not contain the address. *Held*, that the dealer's acceptance of the first installment did not amount to a waiver of his right to reject the second. A strict and literal performance in accordance with the terms of a contract is, as

a rule, required, *Dauchey v. Drake*, 85 N. Y. 407. If the contract is not performed in accordance with the terms, the retention of the goods after the defect has been discovered is a waiver of the defect. *Titley v. Enterprise Store Co.*, 18 Ill. 457. If the goods are to be delivered in installments, and the vendee on receiving part of the goods retains them, he waives any breach of the contract by the vendor, *Shields v. Pettee*, 2 Land. L. C. R. 262 N. Y., and accepting part of the goods and paying for them will justify the vendor in making subsequent deliveries of goods in accordance with the terms of the contract, *Miller v. Moore*, 83 Ga. 685, but if the vendor cannot deliver goods in accordance with the terms of the contract, any installment which goes to the essence of the contract may be refused by the vendee. *Norrington v. Wright*, 115 U. S. 188. Where there is a contract for the sale of goods deliverable in installments, which are to be paid for on delivery, and the seller makes defective delivery in respect to one installment, or the buyer fails to take delivery of or pay for an installment, the question arises whether the breach gives rise merely to a claim for compensation or to a right to treat the whole contract as repudiated. It is difficult to reconcile the English cases upon this point. Some say it is a breach going to the root of the matter, *Hoare v. Rennig*, 5 Hurl. & U. 19, while the opposite view is upheld in the leading case of *Simpson v. Griffin*, L. R. 8 Q. B. 14. In this country the same conflict arises, but the Supreme Court has held it is such a breach. *Norrington v. Wright*, *supra*.

**SEDUCTION—CRIMINAL PROSECUTION—EVIDENCE—ADMISSIBILITY.—STATE v. BENNETT**, 110 N. W. 150 (Ia.).—*Held*, that in a prosecution for seduction, the prosecutrix was properly permitted to testify that she yielded her person to the defendant's embraces because of his promises. The disqualification of parties as witnesses in their own behalf being now practically obsolete throughout our land as witnesses they may testify to intent or motive. *Wigmore Ev.*, Section 581. In accordance, it was held no error to ask the prosecutrix if, at the time of her seduction, she believed that defendant would marry her. *Armstrong v. People*, 70 N. Y. 38. And in *State v. Brinkhaus*, 34 Minn. 285, and *Ferguson v. State*, 71 Miss. 805, it was held that prosecutrix might testify that she permitted the intercourse because of the promises of marriage. But the accused may testify in rebuttal that prosecutrix knew he was engaged to be married to a third person. *State v. Brown*, 86 Ia. 121. Probably, in Alabama alone is the prosecutrix not permitted to testify to the motive which induced her to sexual intercourse. *Wilson v. State*, 73 Ala. 527.

**SLANDER—WORDS ACTIONABLE PER SE.—BATTLES v. TYSON**, 110 N. W. 299 (NEB.).—*Held*, to charge a woman with being a lewd character, of using her body for commercial purposes, and with keeping a gambling room, is actionable, *per se*.

It is not necessary in order to render words actionable *per se*, that they bear criminal import. If the words in their ordinary acceptation, would naturally and presumably be understood as importing a charge of crime, they are *prima facie* actionable. *Stroebe v. Whitney*, 18 N. W. 98 (Minn.). So charging a party with keeping a gambling place is sufficient to charge a crime and so is actionable. *Buckley v. O'Neil*, 113 Mass. 193. In *Ross v. Fitch*, 58 Fed. 148, it was held that words, imputing a want of chastity of a female are not actionable *per se*, but that specific damages

must be alleged and shown. But the common law rule has been greatly modified in many of our states, and words spoken imputing a want of chastity are actionable, *per se*, on the ground that such words tend to hinder her advancement in life, by degrading her in the eyes of respectable people, *Cleveland v. Deitweiler*, 18 Ia. 299. And some of the states have modified the common law rule by statute, making words, implying a want of chastity, actionable *per se*. *Newman v. Stein*, 75 Mich. 402; *Mason v. Stratton*, 1 N. Y. Supp. 511; *Seller v. Jenkins*, 97 Ind. 430.

TRADE-MARKS—UNFAIR COMPETITION—INJUNCTION—BANZHAF ET AL. V. CHASE, 88 PAC. 704 (CAL.). Without regard to whether plaintiffs have, or can have, a trade-mark in the words "Old Homestead," stamped on bread manufactured by them, the stamping into bread manufactured by the defendants of the words "New Homestead," in letters and words of the same size, style, and arrangement, being for the purpose, and with the result of, appropriating plaintiff's trade, *held* that, the defendant will be enjoined, on the ground of fraud.

The general rule of law applicable to this case is that, where a manufacturer has applied a peculiar and distinctive label to designate his goods, and has so used it that his goods are designated by it, a court of equity will restrain another party from adopting and using one so similar that its use is likely to confusion by purchasers exercising the ordinary degree of caution which purchasers are in the habit of exercising with respect to such goods. *Anheuser-Busch Brewing Ass'n. v. Clark*, 26 Fed. 410. Although plaintiff cannot acquire the exclusive right to use the word "American" as descriptive of beer, yet it is entitled to an injunction where an imitation of its signs, bearing that word conspicuously, so closely resembles theirs in size and colored lettering as to deceive the public. *American Brewing Co. v. St. Louis Brewing Co.*, 47 Mo. App. 14. Where the plaintiff has for a number of years used the word "Portland" to distinguish his stoves from others on the market, a rival dealer will be restrained from advertising and selling a different stove as the "Famous Portland," *Van Horn v. Coogan*, 52 N. J. Eq. 380. In order to constitute an infringement it is not necessary that the imitation should be exact. It is sufficient that there is such a substantial similarity that the public would be deceived. *Cooley on Torts*, (3 Ed.) 732.

TRUSTS—DEPOSITS IN BANKS—DEATH OF BENEFICIARIES—EFFECT.—IN RE UNITED STATES TRUST CO. OF NEW YORK, 102 N. Y. SUPP. 271.—*Held*, that a trust created by a father by his depositing money in a bank in his name, in trust for a son, terminates *ipso facto* on the son's death in the life-time of the father, and thereafter the fund remains the property of the father unimpressed by any trust. *Ingraham, J., dissenting*.

The deposit of funds in a bank in the name of the depositor in trust for another does not thereby create an irrevocable trust. *Matter of Totten*, 179 N. Y. 112; *Clark v. Clark*, 108 Mass. 522. And unless there is some evidence of an intention of so doing, *Ray v. Simmons*, 11 R. I. 266; *Estate of Smith*, 144 Pa. St. 428, the title to the funds remains in the depositor. *Cleveland v. Hampdon Savings Bank*, 182 Mass. 110. Even in those jurisdictions that hold that where the depositor dies before the beneficiary, leaving the trust open and unexplained, the latter is entitled to the deposit, *Martin v. Funk*, 75 N. Y. 134; *Conn. River Savings Bank v. Albee*, 64 Vt. 571, it would seem

that the beneficiary, having no interest in the fund previous to the depositor's death, *Cunningham v. Davenport*, 147 N. Y. 43, would have no interest or title to pass to his personal representatives if he died during the life-time of the depositor. *Peoples Savings Bank v. Wells*, 21 R. I. 218.

TRUSTS—RESULTING TRUST.—ATLANTIC CITY R. CO. v. JOHANSON, 65 ATL. 719 (N. J. Ch.).—*Held*, that where defendant street railroad in ejectment purchased the land by parol from the predecessor in title of plaintiff, and paid the consideration and entered into possession, a subsequent purchase of the land from the record owner by plaintiff is with notice, and constitutes the subsequent purchaser a trustee for the benefit of the prior purchaser.

A resulting trust arises by implication of law and not from contract. *Potter v. Clapp*, 203 Ill. 592, and the Statute of Frauds is not applicable. *Lynch v. Herrig*, 32 Mont. 267. So an equitable estate exists in the purchaser of lands where the contract has been fully performed by the parties except as to the delivery of the deed. *Young v. Young*, 45 N. J. Eq. 27. Whatever is sufficient to put a reasonably careful man upon inquiry is notice, *Abell v. Brown*, 55 Md. 222; *e. g.*, possession of the land by one who is not the record owner. *Ferrin v. Errol*, 59 N. H. 234. Therefore, if one purchases from a trustee, with knowledge, actual or constructive, he himself becomes the trustee of the property. *Sadler's Appeal*, 87 Pa. 154. The vendor of an estate who has received the purchase money, but retains the legal title, being a mere trustee for his vendee, *Waddington v. Banks*, 1 Brock. 97, when a vendee is in the occupation of land which the vendor afterwards sells to another to whom he transfers the evidence of legal title, the subsequent purchaser is charged with notice, and will be considered as holding the legal title as a trustee for the first vendee. *Scroggins v. McDougall*, 8 Ala. 382.

VENUE—DISQUALIFICATION OF JUDGE—PERSONAL INTEREST.—BRITTAINE v. MONROE COUNTY, 63 ATL. REP. 1076 (PA.).—*Held*, that in an action against a county, the plea that the presiding judge is a property owner and taxpayer of the county, does not make him "personally interested" so as to require a change of venue.

The rule generally prevails to the effect that the "interest" of a judge, constituting a reason for changing the venue, must be pecuniary, *Hungerford v. Cushing*, 2 Wis. 397; *State v. Winget*, 37 Ohio St. 153; and he is within that rule when he is related to either litigant, or interested in a litigated case, *De La Guerra v. Burton*, 23 Cal. 592; *In re White's Estate*, 37 Cal. 190. But this rule has been held almost universally among the states as not applying to a judge sitting in the trial of a cause against a county of which he is an inhabitant, *Justices of Burlington County v. Fennimore*, 1 N. J. Law. 190; and the same to a town, city or state, *Kilbourn v. State*, 9 Conn. 560; *Commonwealth v. Emery*, 65 Mass. 406. Such an objection is not valid because the "interest" is too shadowy, indirect, remote and contingent to be within the rule "that a man cannot be a judge in his own case." *Myer v. San Diego*, 41 L. R. A. 762; *State v. MacDonald*, 26 Minn. 445. But a judge owning taxable property in a city against which proceedings are brought to annul the corporation and remove its officers, is disqualified to try the cause, *State v. City of Cisco*, (Civ. App.) 33 S. W. 244 (Tex.). However, there appears to be but one case to mar the universality of the "interest rule" in its application to a judge's disqualification by reason

of the fact that he is a taxpayer in the county against which a suit is brought. *Jefferson County Supervisors v. Milwaukee County Supervisors*, 20 Wis. 139.

WITNESSES—IMPEACHMENT—CONTRADICTORY STATEMENTS.—CINCINNATI TRACTION CO. v. STEPHENS, 79 N. E. 235 (O.).—*Held*, that where, upon the trial of a case, a witness is shown to have made statements of fact contradictory to those made by him on the trial, it is error to permit an attempt to rehabilitate the impeached witness by proving that he had made prior statements similar to those made on the trial.

The general tendency, if there are exceptions to the general rule stated above, is that those exceptions occur in the courts of some of the Southern states and of a few in the West. *People v. Doyell*, 48 Cal. 85; *State v. Fontenat*, 48 La. Ann. 283; *Johnson v. Patterson*, 9 N. C. 183. But the courts of the East, North and Central states uphold the general majority rule, *Conrad v. Griffey*, 52 U. S. 480; *Commonwealth v. Jenkins*, 76 Mass. 485; *Smith v. Stickney*, 17 Barb. (N. Y.) 489; *State v. Vincent*, 24 Ia. 570. This majority rule is further supported—for the making of the inconsistent statement being admitted by the witness, proof of prior statements consistent with the statement of the witness on the trial, for the purpose of corroborating and sustaining the credit of the witness, is irrelevant because it would not prove the truthfulness of the witness, nor the reliability of his recollection, nor that there was no inconsistency between the two statements, 1 *Greenl. Ev.* (16th Ed.) 469.

## REVIEWS

*The Austinian Theory of Law.* W. Jethro Brown, LL.D., Litt. D.  
Professor of Comparative Law in the University College of  
Wales, London. John Murray, 1906. pp. xvi, 383.

The form in which the work of John Austin has been preserved has hardly done justice to what that work really was. A law lecturer, like a jury lawyer, must not disdain the practice of repetition. Every man to whom he speaks will not hear everything that is said. Most of them will fail to retain in their minds much that is said, unless it be presented to them from different points of view or, at least, more than once in different forms of words. A good book is seldom written in that way. Austin's lectures were never thoroughly revised for publication. Professor Brown has now taken the most important of them, cut out a third of these, and added over a hundred pages of what is partly a criticism and partly a defence of the Austinian doctrine. He has had especially in view the wants of law teachers and law students, and in notes suggests many questions skilfully framed with a view of helping the latter to test the adequacy of Austin's definitions, by applying them to concrete cases.

Austin was nothing if not logical, and, having adopted his premises, argued from them without flinching, wherever he might be carried. Law came from sovereign power. Sovereign power must be the supreme power. Therefore no government could be at once sovereign and subject, that is, "imperfectly supreme" (p. 139). Professor Brown, differing here from Burgess and Willoughby, says that, as to this, Austin was sacrificing essentials to verbal precision and taking an unhistorical position (p. 141).

In his supplementary chapters, (*excursus*, as he styles them) the author denies that to ascribe personality to a corporation is to adopt a legal fiction. It is a real, though not a physical person. "It is a representation of physical realities, which the law recognizes rather than creates." (p. 264.)

James C. Carter's presentation of the theory that Judges make no law is sharply criticised as a bundle of fallacies (p. 289), in which no distinction is made between the sources from which laws have taken their origin as rules, and the sources from which laws have taken their title to rank as rules which the state will enforce. Judicial precedents find their main office in limiting the power of judges in judgments thereafter rendered (p. 296.) They are parts of a long process of judicial thought, slowly working, in case after case, towards conclusions which, at the beginning, were "felt dimly or not at all." (p. 297).

Occasionally one meets with what seems an unguarded statement, as where (p. 298) it is said that if the House of Lords, on appeal, should construe a statute in a certain way, and Parliament should afterwards declare that it meant the contrary, "the



declaration would be accepted by all courts as final." Such a declaratory act could hardly be permitted to disturb interests vested under the preceding judgment.

Professor Brown gives the American courts credit for inquiring as to the governing principles more than for a governing case. (p. 300.) He recognizes the English tendency towards what Lambert has called *la superstition du cas*, and insists that what the beginner in the study of law needs first is a treatise on elementary law. (p. 370.)

The style of the author is simple and clear. His reading has been extensive, and he quotes from the best words of many men. It is in a friendly spirit that he takes up the Austinian theory, but as one that is "*Nullius addictus jurare in verba magistri.*"

He makes it plainer than Austin himself did; but by putting it in so strong a light that defects are called to the reader's attention which might otherwise have escaped it. S. E. B.

*Remsen on the Preparation and Contests of Wills.* (With plans of and extracts from important wills.) Daniel S. Remsen, of the N. Y. Bar. Baker, Voorhis & Company, 1907.

As stated in the preface, the purpose of this book is to assist lawyers in three important professional duties, namely: in planning a suitable will; in preparing a will that shall, without controversy and against legal attack, effect the testator's purpose; in determining when and by whom probate may be successfully contested. The chapters stating by whom and on what grounds wills may be contested are elementary and are not a valuable feature of the author's work, in fact, they do not belong in a book primarily intended to guide the professional adviser in the work of *ante mortem* creation rather than that of *post mortem* destruction.

The most obvious duty of the lawyer called upon to draft a will is to put the scheme of the testator into clear, concise and effective language. But equally important, though less obvious, is his duty to assist the testator in forming a complete scheme—in doing which he must call to his imagination every possible event of life, death, change of property and of circumstance during the testator's life and afterwards which may interfere with or affect the testator's plan, and must subject the scheme to the test of every such possibility. He must also, especially if the testator's scheme involves a postponement of complete distribution or title, consider the details of possession and administration so that the scheme may be carried out to completion with the least inconvenience, perplexity and loss to those concerned. When he finally drafts the will, he should be able to express the scheme of disposition and administration in such form that others in future years may not merely understand it but may have no excuse for misunderstanding. The lawyer, at all stages of his work, must know and apply the law concerning the subject-matter, that is, such law as is collated and digested in our several standard treatises on wills.

Mr. Remsen has again collated and digested much of this law and to a great extent duplicated the work of other treatise-writers. But this work has been done consistently with the main purpose of the book, in discussing points about which there has been most frequent doubt and controversy and in suggesting how such doubt may be avoided. He has also, by carefully collating the laws and decisions of different states on many points, given to the draftsman information the lack of which in many a case has in the past caused miscarriage of the testator's purpose. Instances of this kind of work well done by the author are his analysis of the state statutes preventing lapse and consequent failure of a gift to one who dies before the testator by the substitution of the heirs or issue of such legatee; also his statement of the rule against perpetuities as applied in the several states; also the suggestion implied forcibly by his emphasis of the fact that a personal discretion dies with the person to whom it is given and cannot, therefore, be exercised by another in the absence of special provision. The author shows his comprehension of the draftsman's needs when he puts into charted form the different kinds of estates which may be created and materially aids one's imagination when he tabulates the situations which may be brought about by contingencies of death and survivorship within a period of time among a class of beneficiaries and their issue.

Many statements of the law as such are so condensed that they can be fully comprehended by the keen mind of the specialist only. Some of the treatment is so elementary that it may be useful to any, however inexperienced, but as a whole, the book is to be commended for the suggestions it makes to the specialist rather than for the guidance it offers to the inexperienced. The author might have added much to the value of his book for all by more concrete suggestion. Take for instance, the subject of substitutional and original gifts, so-called, the discussion of which the author closes by saying that it is better practice to make a gift original. This is well so far as it goes, but definitions do not take the place of clear suggestions. Suppose a testator gives property "to my brothers and to the issue of any dying before me." If a brother be dead at the date of the will, are the issue of such brother intended to share in the gift? Why could not Mr. Remsen have said that if it is intended that such issue shall take, the gift should be "to my brothers and to the issue of such brothers as are now or may then be dead." To illustrate the confusion in definition, we note that in a gift to one of his heirs, the author says the heirs take by substitution (see page 232), whereas it is said by so good an authority as Judge Simeon E. Baldwin that in such case the gift to the heirs is original (*Conn. Trust. etc., Co. v. Hollister*, 74 Conn., 228). In another instance, the author says that it should clearly appear at what period of time the testator wishes members of a class to be ascertained, and adds, "Failures in this respect cause much litigation." The author would have done us all a service if he had given concrete instances of expression which would prevent such failures.

The last half of the book contains synopses of and extracts from wills of wealthy and eminent decedents taken from the records in all parts of the country. Very few of them are models of simple and concise expression, yet nearly all are good specimens of the will-making art and are consequently of great interest and value. They are full of suggestion and aid, especially in the detail of administration; for instance in the provisions authorizing executors and trustees to continue the testator's business, to compound and adjust claims, to invest and re-invest, to rent and repair property, provisions against anticipation and incumbrance of equitable interests, also against liability of executors for default of co-executors. They are also a valuable lesson to all draftsmen in the exact care taken in most instances to foresee and cover every contingency which might cause partial failure of the testator's scheme or doubt and controversy. The will of William Astor is especially notable for its exact provisions for all contingencies and emergencies of administration of the trusts created. That of William M. Evarts is a model will in form and in its exact provision for contingencies. That of Marshall Field is a studied prolongation of trusts to the limit of the rule against perpetuities, even going so far as to direct equitable conversion of lands situated in other jurisdictions where a different rule of perpetuities might be applicable.

This part of his work might have been made much more valuable if the author had made original comment and explanation with references to the law as stated in the first part. He states in his preface that he deems it an impropriety to do so. But he has thus left the real merit of each will to be appreciated by those only who by training and skill are enabled to recognize such merit, while the faults may be followed by those who may be in need of instruction. Let us note a few of the many instances in which original comment would have been instructive. One is in the will of John Jacob Astor, where a tenant for life was given power, with the assent of either of the executors, to sell and convey land to the extent of one-half of the value of the total lands devised to such life tenant. Such a provision might raise practical difficulties in compelling a purchaser to assure himself of the value of lands devised to his grantor and of lands previously conveyed away by such grantor. Another instance is in the will of William E. Dodge, where a sum of money is left to executors to be divided by them among employees of the testator in such proportion as they, on consultation with his wife, might decide. A careful examination of the text in the other part of the book fails to reveal whether such a delegation by the testator of the power to select the objects of his bounty is or is not valid. The gift by Eugene Kelly to his executors to be divided among charities chosen by them is one which has been held invalid in some jurisdictions.

Surely the author might with propriety have called attention in many cases to extreme verbosity and repetition and have explained some points of expression. We might, for instance, like

to know the vital importance and operative effect of a phrase frequently occurring in Rhode Island wills quoted by the author, where ultimate distribution among remote issue is directed to be made *per stirpes*, "*and equally as between brothers and sisters.*"

Mr. Remsen has made a valuable addition to the library of any one interested in the subject of wills, but those led by the title to hope that the material has been especially worked to suit the needs of the inexperienced will be at least disappointed.

*Federal Power over Carriers and Corporations.* By E. Parmelee Prentice. The Macmillan Company, New York, 1907. Cloth, pages 244.

This work is an examination of constitutional history to ascertain the extent of federal power in reference to carriers and corporations, a survey of the modern tendency toward a most liberal construction of this power and the evils which must necessarily result therefrom. A summary of the leading decisions from *Gibbons v. Ogden*, 9 Wheat. 1, to those of the present day leads to the conclusion that as a matter of law the application of federal power in this regard has reached its limit and that as a matter of policy a greater centralization of such power would be both unwise and disastrous.

The current proposals for trust regulation by means of licenses or compulsory federal incorporation, in the opinion of the author, mean that eventually complete centralization is to be substituted for local self-government. It is maintained that now more than ever governments should be kept close to the whole people and that all should participate. Therefore no policy should be adopted which will tend to lessen the importance of our state governments.

The book is clear, interesting and convincing. It is a most timely contribution to the literature upon this subject at a time when proposed remedies for existing evils seem to be framed and advocated without regard to fundamental principles

G. S. V. S.

*The Law of Homicide.* Wharton. Third Edition by Frank H. Bowlby. Civi. pp. 1120.

A perusal of the third edition of this standard work is very helpful in this day of "brain storms" and an evident return to dependence on the principles of the much maligned "unwritten law." Since the second edition of Dr. Wharton's work appeared in 1875 so many old-time illusions have been dispelled and so many unique pleas interposed by ingenious counsel that, were the practitioner to depend on the authority of general text-books on criminal law, he would be sadly handicapped. The latest edition is, as far as the limited space permits, an elaboration of common law principles as adjudicated under varying modern conditions. To style a work of this kind a text-book would be rather misleading as it is in reality more in the nature of a digest of

cases. Over 7000 cases are cited, including the most recent decisions and the editor is to be congratulated on having effectively boiled down so much valuable and interesting matter while giving a pretty thorough exposition of this most important branch of the criminal law. The subjects are well arranged and a complete index covering fifty-two pages makes the work invaluable for ready reference to specific matter. The chapters on Conspiracy, Defenses to Homicide, Evidence, Instructions to Jury and Trials, are particularly interesting. F. P. M.

*Military Law and the Procedure of Courts-Martial.* By Edgar S. Dudley, LL.B., LD.D., Colonel, Judge Advocate, U. S. Army, and Professor of Law at the United States Military Academy. John Wiley & Sons, 1907.

As stated in the preface this book "has been prepared to meet the existing necessities at the United States Military Academy for a text-book which would give a clear and thorough outline of the science of military law, including all recent changes and developments and yet be contained within such brief compass as to be adopted for use in the instruction of Cadets within the limited period assigned to the study of the subject."

The book is admirably adopted for this purpose and the subject is also treated in such a manner as to make it a text of practical use to the service at large as well as to those interested in any way in the application and enforcement of military law.

The work, after two or three chapters relating to military jurisprudence as a science, takes up military tribunals and their formation, composition, function, jurisdiction, etc., both as to general and inferior courts-martial, and is followed by chapters on the conduct of the trial of the accused, step by step from the arrest and confinement, through to the discharge, conviction, review or pardon, as the case might be, not forgetting a very instructive and important chapter on the rules and classification of evidence as applied to courts-martial, and as to the competency and credibility of witnesses, etc. A chapter is also added on the laws of War, including Military Government; Martial Law; the Military Commission; Employment of Troops in the Enforcement of the Laws and the Relations of Military Persons to Civil Authority. The articles of war are separately considered and annotated in a very instructive and useful manner.

An appendix is added to the book which includes the Articles of War, Act Establishing the Summary Court, Act to Prevent the Failure of Military Justice, Executive Order Establishing Limits of Punishments and a list of twenty-six forms used in the conduct of a court-martial.

In short, the work, while not exhaustive, appears to be complete and is not only a text-book for the student, but will without a doubt prove useful and instructive to those interested in the presentation and conduct of cases before courts-martial. It is also written in a very readable and entertaining manner. E. C. S.

*Powers of the American People, Congress, President and Courts.*  
Masuji Miyakawa. Wilkens-Sheiry Co., Washington, D.C.  
pp. 254. Cloth.

The title of this volume is comprehensive and imposing. How it is possible to treat it adequately in two hundred and fifty-four pages is a trifle difficult to understand. It is rather usual to find that the author of a volume of this kind is neither an American nor an Englishman. If he had been reared under the influence of the institutions of the latter country, he might have been in a better position to understand the institutions of our country. By the preface the reader is lead to believe that he is about to enter realms of political wisdom hitherto unexplored. Before long he is brought to a standstill by a singular subject with a plural verb or some other monstrous construction, showing a remarkable unfamiliarity with the English language. These mistakes may be the result of some original work by the proof-reader. However, they certainly give the volume the appearance of the superficial variety.

C. H. H.

*Regulation of Commerce Under the Federal Constitution.* Thomas H. Calvert. Edward Thompson Company. Northport, Long Island, N. Y., 1907. Cloth, pages xiv, 324-380.

The author of this work by confining himself strictly to the title matter has furnished not only the lawyer and practitioner but also the reading public a conservative analysis of the relative position of our Federal and State governments on this important topic. Two criticisms might be made, the first of which is that not much effort seems to have been made to furnish a connected work by needed cross-references. The second is that the work lacks originality. Except for a few lines in the preface, which are more apologetic than positive, the author makes no comment or ventures no opinion on the validity or wisdom of recent Federal Legislation. The work is well arranged and divided and the valuable elementary principles laid down are backed up by references to well-chosen citations from our leading cases.

F. P. M.

## SCHOOL AND ALUMNI NOTES

The programme of events which are scheduled for Commencement Week this year is announced as follows:

**Saturday, June 22:** 11 a. m.—Meeting of the executive committee of the Alumni Advisory Board in Woolsey Hall. 3 p. m.—Meeting of the Advisory Board.

**Sunday, June 23:** 10:30 a. m.—Baccalaureate Address by the President in Woolsey Hall. 5 p. m.—Organ Recital by Professor Jepson in Woolsey Hall. 8 p. m.—Annual meeting of the Yale Foreign Missionary Society in Dwight Hall, with report by Professor F. Wells Williams, chairman of the executive committee.

**Monday, June 24:** 10:30 a. m.—Class Day exercises of the Sheffield Scientific School. 12:30 to 2 p. m.—Annual meeting of the Yale Law School Alumni Association, with collation and address by distinguished alumni and others, in Hendrie Hall. 2 p. m.—Presentation exercises of the Senior Class in College, with the Class Oration, Poem and Class History, on the College Campus, followed by planting of the Class Ivy. 2:30 p. m.—Anniversary exercises of the Law School in the auditorium of Hendrie Hall, with Townsend Prize speaking by members of the Senior Class, followed by an address to the Graduating classes by Hon. Philander C. Knox. 5 p. m.—Address before the Medical School in the College Street Hall by Professor Frederick C. Shattuck, M. D., of Harvard University, on "The Art and Science of Medicine." Meeting of the Class Secretaries' Association at the Graduates' Club. 5 to 7 p. m.—Reception in Byers Hall by the Governing Board and the Senior Class of the Sheffield Scientific School. 8:15 p. m.—Glee Club concert in Woolsey Hall. 10 p. m.—Promenade of the Senior Class in Woolsey Hall.

**Tuesday, June 25:** 10 a. m.—Meeting of the alumni in Alumni Hall, with address by the President. 10 a. m. to 1 p. m.—Polls open in Woodbridge Hall for the election of a member of the Corporation. 3 p. m.—University baseball game, Harvard vs. Yale. 7 p. m.—Third annual graduate Commencement dinner in University Hall.

**Wednesday, June 26:** 10 a. m.—Procession of the officers, graduates, candidates for degrees and invited guests, formed in the College Campus, on the arrival of which at Woolsey Hall the exercises will begin. 1 p. m.—Assembly of alumni in the new University Campus. 1:30 p. m.—Dinner of the Alumni in the University Hall. 5 to 7 p. m.—President's reception for graduates, with their families, and invited guests, in Memorial Hall. The alumni are requested to call for "cards of invitation" (which are necessary), at the Library, after Tuesday noon.

The alumni are requested, on arriving in town, to enter their names in the Alumni Register in the University Library. Graduates and their friends may take their meals at the University Dining Hall.

The course of lectures by Mr. Roger Foster, of New York City, on "Liberty of Contract" began May 17th.

William T. Stead, editor of the *Reviews of Reviews*, spoke in Hendrie Hall recently under the auspices of the Law School Political Club, on the subject: "America's Opportunities at the Hague Conference."

The William L. Storrs lectures will not be given this year owing to the inability of Judge George R. Peck, who had been selected to deliver the lectures, to fulfil the engagement.

The following members of the class of 1907 have been selected to compete in the preliminary contest for the Townsend Prize: William Kernan Camblos, Philadelphia, Pa.; Ferdinand D'Esopo, Hartford, Conn.; William James Maher, Chicago, Ill.; Arthur Packer McKinstry, Worcester, Mass.; Albert Clayton Moss, Lancaster, Pa.; John Carroll Slade, Kelloggsville, N. Y.; George Slingerland Van Schaick, Cobleskill, N. Y.; George Price Whitman, Atlanta, Ga.

The Law School society of Corbey Court and Phi Delta Phi announces the election of the following men: Herbert Bradley Foster, 1908, of Chicago, Ill.; Robert Casper Hoerle, 1908, of Johnstown, Pa.; William Webb, 1909, of Niota, Ill.

'72.—William A. Wright addressed the first of a series of meetings of the Senior class of the Academic Department held April 14th. At these meetings the members of the Senior Class will be addressed during the remainder of the college year by representative men from a number of professions, who will describe the work and ideals of their respective professions.

'93.—Philip P. Wells, formerly Librarian of the Law School and who has been with the government for the past year, has been made chief of the office of law of the National Forest Service.

'93.—A son was born to Mr. and Mrs. David C. Griggs on January 27th. He has been named Henry Charles Griggs.

'93.—Dwight Eliot Bowers died after a short illness at his home, 209 Crown Street, New Haven, April 9th. Mr. Bowers was admitted to the Connecticut bar in 1893 and has been actively engaged in the practice of law in New Haven since that time. In 1896 he was candidate for Town Auditor of New Haven on the National Democratic ticket.

'96.—Charles E. Pickett has been appointed a member of the Board of Charities of New Haven, Conn.



'97.—Nehemiah Candee has moved to Chicago, Ill., to become a member of the law firm of Magruder, Thompson and Candee, with offices in the Chicago Opera House block.

'97.—Richard C. Stoll of Lexington, Ky., was recently elected Secretary of the Kentucky State Bar Association.

'99.—The present address of Charles H. Garnett, is 221 National Security Bank Building, Oklahoma City, Oklahoma.

'00.—Miss Edna Woolworth daughter of Mr. and Mrs. Franklin W. Woolworth, was married on Thursday afternoon, April 26th, at 4 o'clock in the Church of the Heavenly Rest, New York City, to Franklin Laws Hutton.

'05.—John R. Waller, has returned to the United States after taking a graduate course in Oxford University, England, and is now preparing for State Bar examinations at the University of Iowa, Iowa City, Idaho. While abroad Mr. Waller visited the grave of Elihu Yale at Wrexham, Wasel.

'06.—G. Stanleigh Arnold is now chief of the section of trespass in the office of law of the National Forest Service.

'06.—Joseph H. Reich has opened offices for the general practice of law at 510-511 Berger Building, Grant Street and Fourth Avenue, Pittsburg, Pa.



















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